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**Dunbar, Neil (2021) *A critical examination of UEFA's Financial Fair Play Regulations*. PhD Thesis, James Cook University.**

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<https://doi.org/10.25903/6m79%2Dgn05>

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# A Critical Examination of UEFA's Financial Fair Play Regulations

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This thesis is submitted for the degree of Doctor of Philosophy

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Date: 19 March 2021

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## ACKNOWLEDGEMENTS

There are several people I would like to mention for their help and assistance in the completion of this thesis.

I would like to thank my supervisors, Emeritus Professor Stephen Graw, Associate Professor Chris Davies and Associate Professor Tom Middleton, who have provided me with wonderful support and encouragement and were always available to assist when required.

I would also like to thank my colleagues and friends for their collegiality and friendship, which has been, and will continue to be, very gratefully received, enjoyed and reciprocated.

Special thanks to Delys, James and Penny, without whose support this thesis would not have been completed.



## STATEMENT OF CONTRIBUTION OF OTHERS

Nature of Assistance	Contribution	Names, Titles ( <i>if relevant</i> ) and Affiliations of Co-Contributors
Intellectual support	Assistance with development of thesis topic, structure, and methodology  Editorial assistance	Emeritus Professor Stephen Graw (primary advisor)  Associate Professor Chris Davies (secondary advisor)  Associate Professor Tom Middleton (secondary advisor)  Wendy Smith (Jewel See Editing)
Financial support	Fee offset/waiver  Research costs	Australian Postgraduate Award  Internal Resource Account (IRA)

## ABBREVIATIONS

AFL	Australian Football League
AFLW	Australia's National Australian Rules Football for Women
CA	Cricket Australia
CAS	Court of Arbitration for Sport
CCC	Club Competition Committee
CEDB	UEFA Control, Ethics and Disciplinary Body
CFCB	UEFA Club Financial Control Body
CLFFPR	Club Licensing and Financial Fair Play Regulations
CLQS	Club Licensing Quality Standard
CLR	Club Licensing Rules
CNPF	Committee for Non-Amateur and Professional Football
DFL	German Football League
DNCG	Direction Nationale du Controle de Gestion
DR	UEFA Disciplinary Regulations
ECA	European Club Association
ECL	European Competition Law
ECJ	European Court of Justice
EDI	Ethics and Disciplinary Inspector
EFL	English Football League
EPFL	European Professional Football Leagues

EPL	English Premier league
ESL	European Super League
ETSA	European Team Sports Association
EU	European Union
EURO	UEFA European Football Championship
FFP Regulations	Financial Fair Play Regulations
FIFA	Federation Internationale de Football Association
FIFPro	Federation Internationale des Associations de Footballeurs Professionnels
FORCE	Football Organisation Redesign for the next Century in Europe
FSE	Football Supporters Europe
GFC	Global Financial Crisis
ICC	International Cricket Council
IFAB	International Football Association Board
MLB	Major League Baseball
NBA	National Basketball Association
NFL	National Football League
NHL	National Hockey League
NRL	National Rugby League
NPC	National Provisional Championship
NSWRL	New South Wales Rugby League
NZR	New Zealand Rugby

NZRFU	New Zealand Rugby Football Union
PFSC	Professional Football Strategy Council
PR	Procedural Rules governing the UEFA Club Financial Control Body
PSG	Paris St Germain
SLO	Supporter liaison officer
TFEU	Treaty on the Functioning of Europe
UAB	UEFA Appeal's Body
UCL	UEFA Champions League
UCM	UEFA Club Monitoring
UEC	UEFA Executive Committee
UEFA	Union des Associations Europeennes de Football
UEL1	UEFA Europa League 1
UEL2	UEFA Europa League 2
UEL3	UEFA Europa League 3
VFL	Victorian Football League
WADA	World Anti-Doping Agency
WNBA	Women's National Basketball Association

A number of European football leagues are referred to throughout this thesis. This is a summary of what these leagues are called and their country of origin.

Bundesliga 1	German top division
English Premier League (EPL)	English top division
La Liga	Spanish top division
Ligue 1	French top division
Serie A	Italian top division

The English football leagues are referred to throughout this thesis. This is a summary of the names of the top five divisions.

English Premier League	Division 1
Championship League	Division 2
League 1	Division 3
League 2	Division 4
National League	Division 5

## ABSTRACT

This thesis examines the Financial Fair Play (FFP) Regulations introduced by the Union of the European Football Associations (UEFA), the body which governs European football. UEFA established its FFP Regulations in 2010 to counteract the high debt levels among some of the football clubs which threatened the financial stability of European football. The FFP Regulations place financial restrictions on the clubs, requiring them to spend no more than they earn and to pay their debts in a timely manner. These restrictions have some potential to breach European Competition Law (ECL) but the analysis in this thesis demonstrates that the FFP Regulations are valid and, in all probability, do not contravene the requirements of ECL.

ECL is contained in Articles 45, 101(1) and 102 of the *Treaty on the Functioning of the European Union*. Article 45 provides individuals from member countries with the opportunity to work in other member countries. The FFP Regulations do not breach this provision as they meet the four conditions established in the *Gebhard* case of being non-discriminatory, suitable, necessary and proportionate. Article 101(1), which prohibits agreements that seek to prevent, restrict or distort competition, appears, *prima facie*, to be potentially breached by the FFP Regulations. However, there are two exemptions, Article 101(3) and the ancillary restraint exception, which are likely to apply to validate the FFP Regulations. Article 102 prevents dominant undertakings abusing their market position, but as demonstrated in this thesis Article 102 will not apply to the FFP Regulations as UEFA has not displayed abusive conduct, having obtained stakeholder support for its FFP Regulations before introducing them.

However, the FFP Regulations only address the issue of financial stability and not the significant issue of competitive balance. The thesis finds that competitive balance is not as important to European football as it is to other team sports. It also shows that introducing major competitive balance measures would not be successful in European football mainly due to the already large financial differential between the wealthier and the poorer clubs. The gap is too wide to bridge, with UEFA likely to lose the support of its stakeholders if it tries to do so. This could then lead to the defection of the wealthy clubs into a breakaway competition. To operate successfully in its role in European football, UEFA needs the support of the wealthy clubs because their teams have the best players who make UEFA's competitions popular and financially successful. That success underpins UEFA's income which allows it to support the lower echelons and grass roots levels of European football. That said, it would

be advisable for UEFA to attempt to ensure the gulf between the rich and the less well-off clubs does not grow any wider.

The thesis advances and evaluates what UEFA could consider doing to address this issue. The options include increasing the percentage share (currently 7%) which UEFA takes from competition income to place in its solidarity fund for use in developing the poorer clubs and football at a grass roots level. Other options include a luxury tax on player transfers and/or wages which could also be adopted to enhance the solidarity fund. Reviewing the size of playing squads, the number of contracted players attached to a club and the number of player loans also has the potential to increase the solidarity fund and could potentially spread playing talent more evenly between the clubs.

Establishing a new fourth tier European competition could allow more clubs to be involved in UEFA tournaments, giving those additional clubs an opportunity to secure prize money. Establishing a European Super League, containing the best teams from Europe to compete against each other, could also be considered. This could also have the additional benefit of making the major national leagues more competitively balanced.

Finally, the thesis examines the effect the COVID-19 pandemic had on the operation of UEFA's FFP Regulations (as an example of an 'unforeseen disruption'). It demonstrates that the major long-term effect of the pandemic has been to emphasise the critical importance of ensuring that the viability of UEFA's FFP Regulations are protected from unforeseen disruptions. Establishing contingency plans to prepare for possible disruptions, in particular, from war, terrorism, climate change and pandemics is a critical aspect of preserving and enhancing the future of the FFP Regulations and European football as a whole.

## CHAPTER 1: INTRODUCTION

### *1.1 Aims and Thesis questions*

Sport plays a major role in contemporary society with many people either participating in sport or watching it. Interest in sport has increased significantly over the past 60 years due to technological developments including television, satellite television and, more recently, ‘streaming’ of sporting events direct to iPads or mobile phones. As a result of society’s greater interest in sport, government involvement has also increased considerably. Governments appreciate that success in sport can bring prestige to a country and that economic benefits can also arise from hosting important sporting events, as Australia found with hosting the Olympic Games in 2000. It is suggested that sport will continue to play an important role in society in the future with that importance likely to increase further.

The importance of sport with its involvement of countries throughout the world and its major financial implications means it is essential sporting bodies are governed in a financially sound and ethical manner to gain the confidence of the general public and other stakeholders. The corporate governance of sporting entities needs to be of the highest calibre if the integrity of sport is to be maintained. However, despite this, several high-profile sporting clubs have found themselves in severe financial and ethical difficulties over the past three decades and the sporting bodies administering these clubs have had to deal with the problems that such issues cause. It should also be noted that in the general business world, following the collapse of high-profile companies such as Enron and WorldCom, there has been an increased focus on the importance of corporate governance to avoid or limit further financial collapses and ethical problems.

Sporting bodies have also acted, when required, to deal with governance issues. However, sporting entities operate differently to general businesses as they are generally more concerned with winning competitions and trophies than making profits. Thus, while ordinary businesses tend to be profit maximisers, sporting entities, particularly in Europe and Australia, tend to be utility maximisers. Sporting bodies also require rivals to play because they need competition, whereas in businesses the aim is often to put rivals out of business. This disparity in approach and requirements means there must necessarily be some differences in how corporate governance in sport is regulated compared to ordinary businesses if sporting competitions are going to operate successfully.



One such sporting organisation, seeking to operate in this difficult and ever-changing environment, is the Union des Associations Européennes de Football [Union of European Football Associations] (UEFA), which was founded on 15 June 1954 in Basel, Switzerland.<sup>1</sup> Currently, its offices are situated in Nyon and it employs over 450 staff.<sup>2</sup> UEFA's mission remains the same now as it was when it began in the early 1950s, namely 'the fostering and development of unity and solidarity among the European football community'.<sup>3</sup> However, 'it has also become the guardian of football in Europe by working closely with its 55 member associations to promote, protect and nurture the sport at all levels, from the elite and its stars to the millions who play the game as a hobby'.<sup>4</sup> UEFA originally comprised 31 national associations but its numbers grew rapidly in the early 1990s, mainly due to the political developments in Eastern Europe and the fragmentation of the USSR. This led to a growth of new nations, each with its own national football association, resulting in membership to UEFA<sup>5</sup> increasing to the current figure of 55.

By the late 1990s, football's income had increased immeasurably following the extra money available from the sale of pay television rights<sup>6</sup> to its matches but this did not mean that the clubs themselves were better off. Many, 'even prominent ones, were struggling to cover their costs, mainly because their wage bills were out of proportion to their revenue'.<sup>7</sup> UEFA, with the support of the clubs felt compelled to act. The first move was the introduction of a licence, which clubs would need if they wanted 'to participate in the UEFA competitions'.<sup>8</sup> This was established in 2004/05 and was subsequently followed by the Financial Fair Play (FFP)

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<sup>1</sup> UEFA, 'UEFA – European football's governing body', *UEFA.com* (Web Page, viewed 28 June 2020) <<https://www.uefa.com/insideuefa/about-uefa/news/0211-0f8a34cb9fd1-a0e7791dbada-1000--uefa-european-football-s-governing-body/>>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> UEFA has faced difficulties in its 66 year existence, such as the 1985 Heysel stadium disaster which caused considerable damage to the reputation of the game of football generally and, in particular, to UEFA, as the organiser of the competition at which this tragic event occurred. The decision of the European Court in the *Bosman* case in 1995 which changed the rules regarding football players' contracts, also created major issues for UEFA to manage. However, even in carrying out its day-to-day administrative and decision-making duties and processes, UEFA is confronted with a number of challenging situations that arise as a matter of course from operating amongst numerous stakeholders with an array of competing interests. Attempting to reconcile the interests and concerns of national associations, clubs, players, agents, spectators and law-making bodies has provided UEFA officialdom with several demanding issues to resolve.

<sup>6</sup> Television was first introduced in the 1950s but it was only with the introduction of Pay TV in the late 1990s that the income from television rights began to increase significantly.

<sup>7</sup> André Vieli, 'UEFA 60 years at the heart of football', *UEFA.com* (Web Page, 2014) 119 <[https://editorial.uefa.com/resources/021f-0f842a4ba426-22bf135e36bc-1000/uefa\\_60\\_years\\_at\\_the\\_heart\\_of\\_football.pdf](https://editorial.uefa.com/resources/021f-0f842a4ba426-22bf135e36bc-1000/uefa_60_years_at_the_heart_of_football.pdf)>.

<sup>8</sup> Ibid 126.

Regulations,<sup>9</sup> which were approved in 2009 and came into force in 2010. These new financial regulations introduced two specific requirements. First, the clubs were expected to pay their debts in a timely manner and secondly, the breakeven provision required clubs did not spend more than they earned. This latter provision, although approved by the football clubs, has received criticism from some quarters in that it is seen as imposing an excessive restraint on the way the clubs act. Certain stakeholders, including player agents,<sup>10</sup> supporters,<sup>11</sup> and commentators<sup>12</sup> have raised the issue as to whether the FFP Regulations conform to the requirements of European Competition Law (ECL) and have suggested there may be better and less restrictive measures that could be adopted in their place.

Two sets of legal proceedings were commenced against UEFA in respect of its FFP Regulations. The first involved Daniel Striani, a player's agent who was supported by some Manchester City and Paris St Germain (PSG) fans. He brought proceedings in the Belgium

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<sup>9</sup> The UEFA Club Licensing Regulations came into being in 2003. At that time, the regulations related to sporting, infrastructure, personnel, administration, legal and financial issues. In 2010, the financial regulations were fortified with the introduction of a breakeven requirement and stronger measures to cover the payment of club debts. Once these additional financial measures (Financial Fair Play Regulations) were added, the revised regulations became known as the Club Licensing and Financial Fair Play Regulations. This thesis principally concerns an analysis of the new financial measures adopted in 2010 and, therefore, reference in this thesis will predominantly be to these. When this is the case, the reference used will be FFP Regulations (Financial Fair Play Regulations). However, on occasions, reference will be made generally to all the regulations. When this occurs, the reference used will be CLFFPR (Club Licensing and Financial Fair Play Regulations).

<sup>10</sup> See Riccardo Mole, 'The Curious Case of Daniel Striani (C-299/15): A Missed Opportunity', *Eurojus* (Web Page, 21 September 2015) <<http://rivista.eurojus.it/the-curious-case-of-daniel-striani-c-29915-a-missed-opportunity/>>. See also Antoine Duval, 'What happens in Switzerland stays in Switzerland: The Striani Judgment of the Brussels Court of Appeal', *Asser International Sports Law Blog* (Blog Post, 30 April 2019) <<https://www.asser.nl/SportsLaw/Blog/post/what-happens-in-switzerland-stays-in-switzerland-the-striani-judgment-of-the-brussels-court-of-appeals>>.

<sup>11</sup> In the Striani case, the Belgium court allowed other claimants to join the action and these included another players' agent, Dejan Mitrovic, RFC Serieien, a Belgian Second Division club, and 53 football supporters domiciled in the United Kingdom and France. See Ben Van Rompuy, 'The Brussels Court judgment on Financial Fair Play: a futile attempt to pull off a Bosman', *Asser International Sports Law Blog* (Blog Post, 6 July 2015) <<https://www.asser.nl/SportsLaw/Blog/post/the-brussels-court-judgment-on-financial-fair-play-a-futile-attempt-to-pull-off-a-bosman-by-ben-van-rompuy>>. Further, approximately 100 Paris St Germain supporters brought an action against UEFA before Paris' High Court in 2015, arguing that the FFP Regulations prevent investment and go against free competition, thereby maintaining the established elite. See ESPN, 'Paris St Germain supporters bring case against UEFA over FFP – report', *ESPN* (Web Page, 30 April 2015) <<https://www.espn.com.au/football/paris-saint-germain/story/2425932/paris-saint-germain-fans-bring-case-against-uefa-over-ffp>>.

<sup>12</sup> Christopher A Flanagan, 'A tricky European fixture: an assessment of UEFA's Financial Fair Play regulations and their compatibility with EU law' (2013) 13 *International Sports Law Journal* 154, 163. See also Johan Lindholm, 'The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play' (2011) 12(2) *Texas Review of Entertainment & Sports Law* 207, 210. See also Tom Serby, 'The state of EU sports law: lessons from UEFA's "Financial Fair Play" regulations' (2016) 16 *International Sports Law Journal* 37, 50. See also Brian Bodansky, 'Kicking the Penalty: What the European Court of Justice should allow Salary Caps in UEFA' (2013) 36(160) *Fordham International Law Journal* 160. See also Valerie Kaplan, 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications' (2015) 29(4) *Emory International Law Review* 799, 854.

High Court but this case was dismissed on a jurisdictional issue.<sup>13</sup> The second involved a group of PSG supporters who commenced proceedings in the Paris High Court but this matter appears to have been discontinued as no decision has been handed down by the Court. Despite the apparent lack of success of legal action against UEFA in respect of the FFP Regulations, the opportunity for further potential legal action still exists as the European Court and European national courts have still not considered the legitimacy of the FFP Regulations.

The aims of this thesis are threefold. First, this thesis intends to establish whether the FFP Regulations align with UEFA's values, as the body tasked with the management and development of European football, and whether the FFP Regulations achieve what UEFA intended them to accomplish. Secondly, it is proposed to determine whether the FFP Regulations comply with ECL. This will entail considering alternative measures to the FFP Regulations to decide whether there might be a less restrictive means of obtaining the same goal as the FFP Regulations. Thirdly, this thesis aims to review the apparent lack of competitive balance in European football and to put forward recommendations as to how UEFA could deal with this issue.

As originally envisaged, this thesis was intended to answer four thesis questions (questions 1–4 below). The advent of the COVID-19 virus and its impact on, inter alia, how sporting bodies structure themselves and their activities necessitated the late addition of a fifth question.

1. Do the FFP Regulations fulfil the objectives and align with the values of UEFA?

This question considers whether UEFA has met its objectives with its introduction of the FFP Regulations. There are two parts to this question: first, whether UEFA has achieved its specific objectives, which were sought when the FFP Regulations were introduced, and secondly, whether UEFA has also met its more general aims and values which underpin its functioning as the organisation that controls and looks after the interests of European football.

2. Do the FFP Regulations meet the requirements of Articles 45, 101(1), and Article 102 of the Treaty on the Functioning of the European Union?

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<sup>13</sup> Antoine Duval, 'What happens in Switzerland stays in Switzerland: The Striani Judgment of the Brussels Court of Appeals', *Asser International Sports Law Blog* (Blog Post, 30 April 2019) <<https://www.asser.nl/SportsLaw/Blog/post/what-happens-in-switzerland-stays-in-switzerland-the-striani-judgment-of-the-brussels-court-of-appeals>>.

This question requires a close examination of ECL and, in particular, Articles 45, 101 and 102. Articles 101(1) and 102 look to protect competition, with Article 101(1) prohibiting agreements, decisions and practices which have the object or effect of preventing, restricting or distorting competition. Article 102 considers undertakings in a dominant position which abuse their position to prevent or restrict competition whilst Article 45 considers the free movement of workers, providing them with the right to move freely between countries within the European Union. It is intended to analyse the FFP Regulations in relation to each of those articles to determine whether they breach the legislation.

3. If the FFP Regulations are in breach of Articles 101(1) and 102, do they meet the requirements to obtain an exemption under Article 101(3) or the ancillary restraint exception?

This third question considers the situation if the FFP Regulations are in breach of either Article 101(1) or 102 or both. There are potential exemptions to breaches of Articles 101(1) and 102 and this question will examine these exceptions to determine whether they might be applied to the FFP Regulations. The Article 101(3) exemption looks at the matter from an economic perspective, assessing whether it is beneficial to allow the measure, despite its anti-competitive restrictions. The ancillary restraint exception, on the other hand, takes a non-economic approach to the matter to determine whether it should be exempted, from a public interest perspective.

4. What measures could UEFA implement to increase competitive balance within European football?

The lack of competitive balance in some of the national football leagues within Europe appears to be an issue which UEFA, as the body in control of European football, may wish to address. The main purpose of the FFP Regulations is financial stability so that even if the ECJ was to find the FFP Regulations valid, the problem of the lack of competitive balance would still remain as the FFP Regulations will not have a significant effect on this issue. This fourth question, therefore, reviews the subject of competitive balance and seeks to determine what measures, if any, UEFA could adopt to resolve the current situation.

The advent of COVID-19 has meant that a fifth question needs to be added because the impact of the COVID-19 threat on European football is too significant to ignore.

5. What is the effect and ramifications of unforeseen disruptions (such as COVID-19) on the FFP Regulations and on European football generally?

This question considers the impact of unforeseen disruptions, such as war, terrorism, severe weather events and pandemics on European football and what UEFA can do to prepare for such an event and how it can deal with a disruption should it occur. In particular, the chapter looks at how UEFA has handled the COVID-19 pandemic and how the pandemic has impacted on the FFP Regulations.

The thesis structure was devised to provide a clear path towards answering the five research questions. The first part of the thesis (Chapters 1 to 6) provides the background material to the situation. Operational differences facing professional team sports compared to those that affect a normal business are considered and the most popular player movement and financial restraints utilised in professional team sports are reviewed. A study of UEFA as the governing body of European football and its values is undertaken. The Club Licensing and Financial Fair Play Regulations (CLFFPR) are then reviewed in detail, followed by a full examination of the relevant parts of ECL. Whilst this thesis does not contain a dedicated literature review chapter, current literature on each topic is examined and documented at the time the relevant topic is considered. The second part of the thesis (Chapters 7 to 12) discusses and analyses the material in the first part to provide answers to the five research questions.

## *1.2 Methodology*

There are three methods of legal research used in this thesis, doctrinal, socio-legal and comparative. Each of these is considered in turn.

Doctrinal research ‘focuses, heavily, if not exclusively, upon the law itself as an internal self-sustaining set of principles that can be accessed through reading court judgments and statutes with little or no reference to the world outside the law’.<sup>14</sup> It, therefore, uses judgments, statutes and regulations to explain the law. Although some commentators describe doctrinal research as similar to quantitative research, it is probably better described as qualitative as law is reasoned, not found. As Dobinson and Johns point out, ‘judges reason inductively, analysing

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<sup>14</sup> Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2012) 1.

a range of authorities relevant to the facts, deriving a general principle of law from these authorities and applying it to the facts in front of them'.<sup>15</sup>

Doctrinal research can be described 'as research which asks what the law is in a particular area'.<sup>16</sup> This entails the researcher analysing primary source material (case law or statute) together with journal articles or other secondary source material. The main aim of the researcher is to describe a body of law and how it applies. In carrying out this task the researcher is likely to analyse the law to show how it 'has developed in terms of judicial reasoning and legislative enactment'.<sup>17</sup>

McConville and Chui note that 'in recent years, several commentators have criticized pure doctrinal analysis for its "intellectually rigid, inflexible and inward-looking" approach of understanding law and the operation of the legal system'.<sup>18</sup> However, this may have arisen due to the insufficient acknowledgement of the depth of reasoning exercised by judges in many instances when interpreting statute and case law.

In this thesis, doctrinal research will be used to examine ECL to determine whether the breakeven requirement introduced by UEFA is legally enforceable or not. It will then be utilised to investigate whether other means of financial restraint, such as maximum wage, salary caps, luxury tax or revenue sharing, would be more likely to meet ECL requirements than the FFP Regulations.

Socio-legal research involves using other disciplines, like sociology and political science, to aid legal research. It emerged 'in the late 1960s (and) is often referred to as "law in context"'.<sup>19</sup> Researchers using this methodology 'point to the limitations of doctrinal research as being too narrow in its scope and application of understanding law by reference primarily to case law'.<sup>20</sup> Cotterrell states that:

All the centuries of purely doctrinal writing on law have produced less valuable knowledge about what law is, as a social phenomenon, and what it does than the

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<sup>15</sup> Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2012) 21.

<sup>16</sup> Ibid 19.

<sup>17</sup> Ibid.

<sup>18</sup> McConville and Chui (n 14) 4. See also D.W. Vick, 'Interdisciplinary and the Discipline of Law' (2004) 31 *Journal of Law and Society* 164.

<sup>19</sup> Ibid 1.

<sup>20</sup> Ibid 5.

relatively few decades of work in sophisticated modern empirical socio-legal studies.<sup>21</sup>

The link between doctrinal and socio-legal research is probably not as wide as some of the commentators suggest because in many instances a judge will have to employ a socio-legal approach to reach a decision. This has particular relevance in relation to this thesis when the restraint of trade doctrine is examined. The restraint of trade doctrine requires the judge to consider what is ‘reasonable’ and in making a decision the judge will need to exercise a socio-legal approach, particularly, where the facts before the judge have not been considered in a previous judgment. The law in the area of restraint of trade requires the judge not only to determine ‘reasonableness’ from the perspective of the parties to the action but also, more generally, from a public policy/stakeholder perspective.

The nature of restraint of trade law and its ‘reasonableness’ test means that the socio-legal research methodology can be legitimately used to answer the same questions examined using the doctrinal research methodology. On the one hand, socio-legal research is part of the judge’s decision and is, therefore, doctrinal, but, on the other hand, encroachment into the area of socio-legal is taking place, because the judge is, in fact, making his or her decision by looking beyond the actual law to evaluate what is reasonable from a socio-legal perspective.

Comparative legal research developed as a result of globalisation. It can be simply described as comparing what occurs legally in one area with what happens in another. This is often done using the unit of a country and comparing what happens in another country. Wilson suggests that initially, at least, comparative law was seen as very much as ‘an extension of the study of national law’. He states that:

By looking overseas, by looking at other legal systems, it has been hoped to benefit the national legal system of the observer, offering suggestions for future developments, providing warnings of possible difficulties, giving an opportunity to stand back from one’s own national system and look at it more critically, but not to remove it from first place on the agenda.<sup>22</sup>

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<sup>21</sup> Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford University Press, 1995) 296.

<sup>22</sup> Geoffrey Wilson, ‘Comparative Legal Scholarship’ in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2012) 87.

However, in more recent times, this parochial view of comparative law has developed a more international flavour. An example of this is the efforts made by countries to ensure the facilitation of trade by finding ways to reduce problems caused by the conflict of laws.<sup>23</sup> A further example is the development of European Community law that has seen lawyers from different legal systems coming together to produce a common Community law that can be applied in the legal systems of member states.<sup>24</sup> It is, of course, this law that applies to the FFP Regulations and will be utilised in this thesis to determine whether the FFP Regulations fall within the parameters of ECL.

Comparative legal research will also be used in this thesis when considering the use of financial restraints other than the FFP Regulations currently adopted in Europe. This will entail, for instance, examining the use of salary caps in the US and Australia and revenue sharing and the luxury tax in the US, with the aim to determine whether one of these types of financial control, or a combination of them, would be more appropriate for use by UEFA than the FFP Regulations.

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<sup>23</sup> Ibid 88.

<sup>24</sup> Ibid.



## CHAPTER 2: PROFESSIONAL TEAM SPORTS AND GOVERNANCE

### 2.1 Introduction

Chapter two considers the differences between professional team sports and other businesses. Governments in western societies have enacted legislation to ensure competition between businesses. It is proposed to examine the differences to determine whether professional team sports need to receive some relief or exemption from competition legislation to function effectively.

### 2.2 The Need for Competition and Close Contests

Professional team sports entities have always been viewed differently to normal businesses. In the early days of professional team sports, a maximum wage was sometimes employed by competitions to seek parity between competing teams, and commentators from the 1950s onwards have acknowledged the importance of teams needing each other to provide a marketable product.<sup>25</sup> Courts in the US, Europe and Australia have tended to acknowledge the interdependence of the clubs to produce contests and this has generally made them more willing to consider clubs imposing player restraints of trade. The reason for this is the acceptance of the general principle that, although a professional sports team wants to defeat its opponents, it needs its rivals to remain in existence so it continues to have teams to compete against. Without its opponents a professional sporting team would have no purpose and find itself financially unviable. Davies, for instance, states that:

Sporting leagues, from an economic perspective, are in many ways unique businesses in that they do not involve direct competition between the respective teams, but involve a situation where even the strongest teams in the league require other teams in order to be competitive.<sup>26</sup>

The need for an opponent goes beyond this basic requirement to also include the necessity for as close a competition as possible. Rottenberg notes that uncertainty of outcome is important

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<sup>25</sup> Simon Rottenberg, 'The Baseball Players' Labour Market' (1956) 64(3) *Journal of Political Economy* 242. See also Walter Neale 'The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition' (1964) 78(1) *Quarterly Journal of Economics* 1, and John Jones 'The Economics of the National Hockey League' 11(2) *The Canadian Journal of Economics* 1.

<sup>26</sup> Chris Davies, 'The financial crisis in the Premier League: is a salary cap the answer?' (2010) 31(11) *European Competition Law Review* 442.

to obtaining this objective and, therefore, the demand for teams to be evenly matched is crucial,<sup>27</sup> stating that:

Professional team competitions are different from other kinds of business ventures. If a seller of shoes is able to capture the market and to cause other sellers of shoes to suffer losses and withdraw, the surviving competitor is a clear gainer. But in baseball no team can be successful unless its competitors also survive and prosper sufficiently so that the differences in the quality of play among teams are not “too great”.<sup>28</sup>

Dabscheck supports this view suggesting that ‘if the result of a competition is uncertain, interest in its result will be high, and so in turn will attendances; gate receipts and profits. Uncertainty in a sporting competition is maximized by having teams of equal sporting ability.’<sup>29</sup> Sloane, meanwhile, widens the uncertainty of outcome to include not only the uncertainty of a particular match but also seasonal uncertainty and several seasons’ uncertainty, in terms of whether the same team is winning the competition each year.<sup>30</sup> All of these uncertainties, he argues, play a part in determining the success or otherwise of a particular competition.<sup>31</sup>

Covick, on the other hand, takes a contrary view in that he contends the spectator, who chooses his or her games by way of looking for a close outcome forms only a small minority of spectators who attend matches.<sup>32</sup> He argues that spectator motivation is more affected by ‘committed supporter’ and the ‘champ-follower’ theories,<sup>33</sup> suggesting that ‘committed supporters’ will support their team, whoever they are playing. The ‘champ followers’ on the other hand will either support the team putting on the highest quality performances at any

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<sup>27</sup> Rottenberg (n 25) 255. Rottenberg says ‘(i)n one sense, the teams compete; in another, they combine in a single firm in which the success of each branch requires that it be not “too much” more efficient than the other. If it is, output falls.’

<sup>28</sup> Ibid 254.

<sup>29</sup> Braham Dabscheck, ‘Sporting Equality: Labour Market vs Product Market Control’ (1975) 17(2) *Journal of Industrial Relations* 176.

<sup>30</sup> Peter Sloane, ‘Rottenberg and the Economics of Sport after 50 years: An Evaluation’ (2006) *International Association of Sports Economists Working Paper Series*, Paper No. 06-08 1, 9. Sloane denotes two types of seasonal uncertainty, namely the number of teams involved in the title race and, secondly, on a more individual level, ‘the longer one’s own team remains in contention’. See also J Cairns, N Jennett, and P Sloane, ‘The Economics of Professional Team Sports: A Survey of Theory and Evidence’ (1986) 13(1) *Journal of Economic Studies* 1, 6.

<sup>31</sup> Ibid.

<sup>32</sup> Owen Covick, ‘Sporting Equality in Professional Team Sports Leagues and Labour Market Controls: What is the Relationship?’ (1986) 2(2) *Sporting Traditions* 65.

<sup>33</sup> Ibid 65–66.

particular time or, alternatively, support the team they consider will be the champions for the current season.<sup>34</sup>

There may be some merit in Covick's argument but the geographical situation of the high quality/champion team is going to reduce the number of 'champ supporters' from attending games involving their teams. Covick's view fails to fully consider those spectators who follow their local side, but not to the 'committed supporter' level, and require a further reason to go and watch their local team play. This may be the prospect of an exciting game or watching a good side play against the local team. Thus, Covick's idea of supporters being 'committed supporters' or 'champ followers' may apply to a majority of football spectators but there also could be a sizeable minority who will not fit under these headings.

Another factor attributable to professional team sports is variable quality. Most businesses strive to provide a consistent and high-quality product or service. Smith says that 'in commercial business markets, most companies strive to deliver products and services that have only minor variability in their quality; they are reliable and standardized'.<sup>35</sup> However, this is not possible in team sport events where 'complexities arise as a result of consumption overlapping with the end stages of the production process'.<sup>36</sup> Individual players may have an off-day or teams may not function well together and this will affect the quality of their performance. Other factors can also 'contribute to this variability, including weather, player injuries, the venue, the quality of sporting performances, the closeness of the scores and even the size of the crowd'.<sup>37</sup>

Variable quality is a paradoxical component of professional team sports in that it can be a positive for the matches in a competition as it helps to provide uncertainty of outcome to any given contest. However, it is also a negative in that it makes it difficult for organisers of the competition who are trying to ensure an even contest, as it is possible for one team to provide a poor performance, and thus create a one-sided match. It has to be acknowledged that some contests are going to suffer as a result of variable quality and sporting administrators have to accept that this will sometimes occur. Efforts can be made to lessen this impact by ensuring

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<sup>34</sup> Ibid 66–67.

<sup>35</sup> Aaron C. T. Smith, 'The Path to "Professionalism" Professional Management Practices & The Australian Sports Administrator: A Critical Examination' (PhD Thesis, Victoria University of Technology, 1998) 70.

<sup>36</sup> J Cairns, N Jennett, and P Sloane, 'The Economics of Professional Team Sports: A Survey of Theory and Evidence' (1986) 13(1) *Journal of Economic Studies* 1, 12.

<sup>37</sup> Bob Stewart and Aaron Smith, 'The Special Features of Sport' (1999) 2(1) *Annals of Leisure Research* 87, 92.

that amenities of a high standard are provided to match patrons. These can include ‘benefits like premium seating, hospitality boxes, catering services, club merchandise, and glossy programs’.<sup>38</sup>

When considering the need for close encounters between teams in a competition, it is also important to note the different structures in place. For example, North America and Australia operate franchise-based closed systems with no promotion and relegation, whereas in England and Europe open systems exist, particularly in the area of football, with promotion and relegation taking place. Smith and Stewart point out that:

Whereas the North American leagues are closed systems where the same teams participate no matter what their league standing in the previous league, the European governance model extols the benefits of a promotion and relegation system.<sup>39</sup>

A closed system occurs where the same teams play in the competition during each season and changes to the composition of the competition only take place if a new franchise is admitted or one of the current teams leaves.<sup>40</sup> An open system, on the other hand, allows annual changes to the sides in the competition through the promotion and relegation system.<sup>41</sup> One possible reason for the differences in approach is mainly demographic, particularly in the case of Australia, with Davies stating that:

All the Australian leagues are, and always have been, closed-system competitions, due partly to the combination of a relatively small population spread across large distances, but also because it is the only country in the world that has four professional football codes.<sup>42</sup>

In the case of North America another reason for the closed system is also apparent. Government subsidies have, in the past, been used to build stadiums and arenas, and owners of sporting franchises have been prepared, quite understandably, to move their teams to an area where a stadium has been built.<sup>43</sup> The provision of basic but very important infrastructure for a team, together with its availability in a ready-made catchment area for

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<sup>38</sup> Smith (n 35) 70.

<sup>39</sup> Aaron Smith and Bob Stewart, ‘The special features of sport: A critical revisit’ (2010) 13(1) *Sports Management Review* 1, 8.

<sup>40</sup> Davies (n 26) 443.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Brian Cheffins, ‘Playing the Stock Market: “Going Public” and Professional Team Sports’ (1999) 24(3) *Journal of Corporation Law*, 641, 649–650.

spectators/followers, would have made it a fairly easy decision for an owner to move their team there. Cheffins suggests that governments are not so generous nowadays and have constituents demanding money be spent on more pressing resources, such as schools and hospitals,<sup>44</sup> but the fact remains that the presence of the earlier subsidies for sports stadiums paved the way for the strategic placement of clubs in areas of reasonably large populations.

The added element of promotion and relegation provides extra interest to spectators in much the same way as a close encounter between equally balanced sides does. English football has recognised the importance of this issue and has in recent years increased the number of promotion and relegation places and play-off matches for some of the promotion spots.<sup>45</sup> This has had the benefit of keeping more teams competitively involved in late season matches and generating spectator excitement. North American and Australian competitions lack the promotion and relegation option in their competitions, so it is important they create a close and exciting competition. If these outcomes are not available in a closed competition environment then a decline in spectator/supporter interest is likely to occur. Stewart and Smith state that '(t)he ongoing viability of the competition, and the financial health of constituent clubs will be sustained only if rules are introduced which distribute playing talent between teams'.<sup>46</sup> This is a likely explanation for competitions where a closed system operates, having incorporated measures like salary caps, draft systems and revenue sharing to encourage competitive balance.<sup>47</sup>

### *2.3 The Objectives of Professional Team Sports*

Another difference between business entities and professional sport teams can lie in the objectives of the enterprise. A non-sporting business will tend to focus on financial matters

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<sup>44</sup> Ibid 650.

<sup>45</sup> In the 1986/87 season, the English Football League introduced changes to the promotion and relegation system in the four main divisions of its competition. Three teams rather than two were to be relegated from Division 1. Three teams were to be promoted from Division 2 to Division 1 with the third team being decided by a play-off competition involving the clubs which finished third, fourth, fifth and sixth in Division 2. Three teams were to be relegated from Division 2 to Division 3. Three teams were to be promoted from Division 3 to Division 2 on the same basis as the Division 2 to Division 1 promotion. Four teams were to be relegated from Division 3 to Division 4. In Division 4, four teams were to be promoted with the fourth team being decided by a play-off competition involving the clubs which finished fourth, fifth, sixth and seventh. Two teams were to be automatically relegated to the Conference league, whereas, before the bottom sides merely had to seek reelection which they normally obtained.

<sup>46</sup> Stewart and Smith (n 37) 92.

<sup>47</sup> In North America, the NFL and the NBA use a draft system, a salary cap and revenue sharing. The NBA also uses a luxury tax, which the MLB also adopts. In Australia, the AFL use a draft system, a salary cap and revenue sharing, whereas, the NRL uses a salary cap, with revenue sharing utilised for distributing broadcasting revenue equally between the clubs.

including making a profit, whereas the sporting entity will usually place greater importance on winning competitions, with Sloane stating that:

It is quite apparent that directors and shareholders invest money in football clubs not because of expectations of pecuniary income but for such psychological reasons as the urge of power, the desire for prestige, the propensity to group identification and the related feeling of group loyalty.<sup>48</sup>

Sloane distinguishes between profit maximisation, where financial success is the main driver, and utility maximisation, where the winning of competitions is perceived as being more crucial, supporting the view that the main interest of a football club is ‘to provide entertainment in the form of a football match. The objective is not to maximize profits but to achieve playing success whilst remaining solvent’.<sup>49</sup>

Rottenberg, however, suggests that owners of baseball teams operate on the basis of profit maximisation and that the finance of professional sports teams could be viewed using the same basis as for other businesses.<sup>50</sup> Similarly El-Hodri and Quirk<sup>51</sup> and Fort and Quirk<sup>52</sup> use profit-maximising behaviour by teams as basic assumptions for their research. These contrary views tend to come from American writers and there appears to be some difference in the approaches of team owners in America to those in Europe. This may occur due to the sports team structure in America where there are fewer clubs and competing leagues together with more controls<sup>53</sup> on clubs to ensure an equalisation of competing teams. In Europe, there are more clubs, some large and some small, and there are often a significant number of clubs in particular locations.<sup>54</sup> There have generally been fewer controls placed on European sports teams, as compared to American teams, which has also given greater latitude to team owners to spend more money on

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<sup>48</sup> Peter Sloane, ‘The Economics of Professional Football’ (1971) 18 *Scottish Journal of Political Economy* 121, 134.

<sup>49</sup> Ibid. This view was originally recorded in the Political and Economic Planning Report on English Football, which was first published in June 1966.

<sup>50</sup> Peter Sloane, ‘The economics of sport’ (2006) 2 *Insights* 1, 2. See also Simon Rottenberg, ‘The Baseball Players’ Labour Market’ (1956) 64(3) *Journal of Political Economy* 242.

<sup>51</sup> Mohamed El-Hodiri and James Quirk, ‘An Economic Model of a Professional Sports League’ (1971) 79(6) *The Journal of Political Economy* 1302. This paper considers the economic structure of professional sports teams to determine the extent to which teams should be able to impose employment restraints on their players. The authors’ model, which they use to make their determination, incorporates fundamental features of the industry including the maximisation of profits.

<sup>52</sup> Rodney Fort and James Quirk, ‘Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues’ (1995) 33(3) *Journal of Economic Literature* 1265, 1266. This paper considers the basic economics and effects of the cross-subsidisation methods used by sporting leagues. One of the basic assumptions underlying this work is profit maximising behaviour by teams.

<sup>53</sup> Examples include salary cap, luxury tax, and revenue sharing arrangements.

<sup>54</sup> Sloane (n 50) 4.

trying to achieve team success.<sup>55</sup> More recently, Sloane has played down the disparity between Europe and America, stating:

By and large, European sports economists have followed... a (*utility maximizing*) model by assuming that clubs attempt to maximize playing success to a break-even constraint, whereas in North America, where there is also recognition that sportsmen-owners do exist, the profit maximization assumption has prevailed.<sup>56</sup>

Sloane's change of position is probably warranted for two reasons. First, the utility maximising model has been used in European football with owners like Sheikh Mansour bin Zayed al Nahyan and Roman Abramovich utilising private money to enhance the playing strength of their respective clubs. However, this practice has become more difficult to pursue with the introduction of the FFP Regulations requiring clubs to spend no more than they earn. Second, there are examples of sports in Europe that have taken a profit maximisation approach. Cricket, for instance, although more an English sport than European, is an example of a team sport that has concentrated on profit maximisation for survival reasons, with Schofield concluding that:

[T]he cartel (of first class teams) developed a clear profit consciousness, for reasons of survival, as evidenced in activity to (i) exclude outsiders who might dilute profit opportunities (both as new members of the group and as competitors in product and input markets), (ii) limit competitive bidding amongst group members in the labour market, (iii) enhance group revenues through demand promotion policies and the search for new sources of income, and (iv) contain costs in ways additional to the protection of labour market monopsony.<sup>57</sup>

It should be noted that, in practical terms, it is often difficult to discern whether an owner's motivation is profit-seeking or competition winning, with Cairns et al pointing out that 'there are great difficulties involved in distinguishing between the competing hypotheses'.<sup>58</sup> Zimbalist likewise suggests that '[t]he likelihood is that owner-objective functions are both more nuanced and more varied than is allowed in the literature attempting to model sports leagues',<sup>59</sup> and he

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<sup>55</sup> Examples in the Premier League in England include Roman Abramovich at Chelsea where the club lost £88 million and £140 million in successive seasons, and Sheikh Mansour bin Zayed al Nahyan at Manchester City who spent an estimated £650 million in his first year at the club.

<sup>56</sup> Sloane (n 50) 2.

<sup>57</sup> John Schofield, 'The development of First-Class Cricket in England: An Economic Analysis' (1982) 30(4) *The Journal of Industrial Economics* 337, 358.

<sup>58</sup> Cairns, Jennett, and Sloane (n 36) 8.

<sup>59</sup> Andrew Zimbalist, 'Sport as Business' (2003) 19(4) *Oxford Review of Economic Policy* 503, 507.

also adds ‘owners maximize global, long-term returns and that these are very different from a team’s reported annual operating profits’.<sup>60</sup> Furthermore, it can be argued that profit maximisation is a passport to utility maximisation, in the sense that if the club is making a good profit then it will be able to use this profit to build a winning team. Syzmanski and Kuypers support this view, stating that ‘[a]bove all they (*sports teams*) have to pay wages to players and invest in the development of talent in order to achieve winning performances, perhaps for their own sake, but also to keep the public interested in the club willing to pay for its product’.<sup>61</sup> Smith and Stewart see the situation in simple terms, suggesting that ‘success is a function of a strong stream of revenue’.<sup>62</sup> This is evidenced by a successful club earning prize money from doing well in competitions and increasing its revenue from developing its spectator support and sponsorship interest.

#### 2.4 *The Issue of Fixed Supply*

Another important difference between normal businesses and sports clubs is the fixed supply issue. There are two points to consider. Firstly, the date for a sports fixture must be set in advance so that teams know when and where they are playing. Competition secretaries usually have the fixtures allocated for all the teams in the competition before the season starts. However, a business that manufactures washing machines can sell their product whenever they want. They can open their outlets seven days a week and, apart possibly from Christmas Day, every day in each year. The same does not apply to professional sports teams, where ‘as a result of the process of production being observed consumers have far less choice as to when and where consumption takes place’.<sup>63</sup> Second, commercial organisations can usually increase their supply to meet demand.<sup>64</sup> Hence, a business that manufactures washing machines can normally make more washing machines if there is customer demand.

Cairns et al therefore suggest that

Many of the special characteristics of the team sports product can be traced to the unusual feature that consumption takes place at the same time as the last stage of the production process. Before the match there may be a sense of anticipation but

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<sup>60</sup> Ibid 510.

<sup>61</sup> S Syzmanski and T Kuypers, (1999) *Winners and losers: The business strategy of football*. Harmondsworth, UK: Viking Press 7.

<sup>62</sup> Smith and Stewart (n 39) 5.

<sup>63</sup> Cairns, Jennett, and Sloane (n 36) 12.

<sup>64</sup> Stewart and Smith (n 37) 96.



there is no product until the match actually takes place. The good is highly perishable in that unsold seats remain unsold and cannot be carried forward by inventory accumulation.<sup>65</sup>

A sports club can only play a limited number of games over the season.<sup>66</sup> For a local derby it may be possible for a club to fill their ground twice due to spectator demand, but the match is usually only played once a season. In this situation, the club misses out on the extra profit that could have been made if its ground could accommodate all the spectators who wanted to watch the game. Conversely, when a match is poorly attended, the club loses potential revenue in respect of the unsold seats.

In the longer term, it may be possible for a sport to take advantage of greater spectator support by increasing the number of games that are played over the season.<sup>67</sup> A good example of this is international cricket, where there has been an increase in the number of games played as well as an increase in the different forms of cricket played.<sup>68</sup> Further, a sport is now also able to take advantage of new technologies to deliver its sporting events to the public in a variety of modes rather than just via land-based connections.<sup>69</sup>

## 2.5 *The Invariance Principle*

Clearly some differences exist between commercial businesses and professional sports teams. Some are longstanding and others are relatively new. It is the older ones that are more significant when appraising whether constraints relating to player employment are necessary to allow sporting clubs to operate effectively. In other words, does the need for an evenness in the competition between clubs warrant the imposition of rules curtailing the rights of players to negotiate their contracts in a free market environment?

Rottenberg, for instance, states that the invariance principle would apply.<sup>70</sup> This principle works on the basis that players would move to the clubs that most wanted them. It is closely related to the Coase theorem which relies on competition for scarce resources and the concept of markets reaching an equilibrium of demand and supply. In an efficient market, the players will join those clubs which most value them, with Sloane stating that:

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<sup>65</sup> Cairns, Jennett, and Sloane (n 36) 11.

<sup>66</sup> Ibid.

<sup>67</sup> Stewart and Smith (n 37) 96.

<sup>68</sup> Ibid.

<sup>69</sup> Smith and Stewart (n 39) 8.

<sup>70</sup> Rottenberg (n 25) 242–258.

The Coase theorem itself states that in competitive markets and given that resources are freely exchangeable the distribution of their ownership among agents is irrelevant to ensuring that they are used efficiently. This assumes not only perfect competition, perfect information, and the absence of transaction costs, but also the absence of wealth and income effects.<sup>71</sup>

Rottenberg's view is that 'free markets would give as good as aggregate results as any other kind of market ... in which all firms must be nearly equal if each is to prosper'.<sup>72</sup> He maintains that the law of diminishing returns would apply in that if a wealthy club continued to buy more players it would obtain an ever-decreasing return on its investments. Further, based on economies of scale he argues that this will occur when one club becomes far superior to the others and interest fades. Then, when these eventualities happen, according to Rottenberg, the club which has spent funds acquiring players will sell them, thus bringing an equilibrium to the situation. In theory this may occur but it is unlikely in practice as not all clubs operate on a profit-operating basis; some take a utility maximising approach. Sloane suggests that 'neither the fans nor the players will be happy with the sale of good players to inferior clubs'<sup>73</sup> and that, in any event, smaller clubs may have self-imposed salary limits and could not afford to buy players from the wealthier clubs.<sup>74</sup> He acknowledges, however, this is more likely to occur in Europe than in the US because of the greater disparity in the size of clubs in Europe compared to those the US.<sup>75</sup>

Other writers have also pointed out that the invariance principle does not work in practice because of external factors preventing it from an efficient and consistent application. Neale, Demmert, and Daly and Moore have all argued that externalities foil the efficient distribution of playing skills with the latter arguing that the transaction costs are large and, therefore, make the principle unlikely to work in this situation.<sup>76</sup> Another external factor to consider is that player talent does not work in a uniform fashion. A player's talents may excel when playing with particular players from one team. If moved to another team, however, his or her talents may not be so effective.<sup>77</sup> Another external factor to consider is the potential for over

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<sup>71</sup> Sloane (n 30) 4.

<sup>72</sup> Rottenberg (n 25) 258.

<sup>73</sup> Sloane (n 30) 5.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 5–6. See Neale (n 25) 1-14. See also Henry Demmert, *The Economics of Professional Team Sports* (Lexington Books 2000).and George Daly and William Moore, 'Externalities, Property Rights and the Allocation of Resources in Major League Baseball' (1981) 19(1) *Economic Inquiry* 77-95.

<sup>77</sup> Ibid.

evaluation of a particular player by a club, which would prevent the invariance principle from working effectively.<sup>78</sup>

With Rottenberg's invariance principle generally accepted as not being workable from a practical perspective and on the basis that professional sports teams require an uncertainty of outcome to capture the interest of spectators and supporters, there would seem to be a need for some means of financial or other control to protect the competitiveness of the matches. Without such restriction there is a distinct likelihood that an owner, particularly with a utility-maximised approach, would spend such financial resources that were available, to secure the best players to ensure success in the competition.

## 2.6 *The Legal Position*

Countries in the western world generally have legislation in place to combat anti-competitive behaviour. The US has the *Sherman Antitrust Act 1890*, Europe has the *Treaty on the Functioning of European Union 2007*, and Australia has the *Competition and Consumer Act 2010* (Cth). Courts in these jurisdictions have taken into account the issue of competitive balance in their decisions. In *Buckley v Tutty* ('*Buckley*'),<sup>79</sup> the High Court of Australia held the retain and transfer system conducted in the rugby league competition to be in restraint of trade. It stated, however, that it was:

[A] legitimate object of the League and of the district clubs to ensure that the teams fielded in the competition are as strong and as well matched as possible, for in that way the support of the public will be attracted and maintained.<sup>80</sup>

The European Court of Justice (ECJ) came to a similar conclusion in *Union Royale Belge Des Societies Football Association ASBL v Jean-Marc Bosman* ('*Bosman*'),<sup>81</sup> finding football's retain and transfer system to be anti-competitive but recognising there was a need to protect the competitive balance between sporting clubs. Advocate General Lenz suggested that this could be achieved by less anti-competitive measures than the retain and transfer system, concluding that:

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<sup>78</sup> Ibid. See also J. Cassing and R. Douglas, 'Implications of the Auction Mechanism in Baseball's Free Agent Draft, (1986) 47(1) *Southern Economic Journal* 190–192.

<sup>79</sup> *Buckley v Tutty* (1971) 125 CLR 353 ('*Buckley*').

<sup>80</sup> Ibid 377.

<sup>81</sup> Case 415/93, *Union Royale des Societes de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-04921 ('*Bosman*').

[T]he transfer rules hitherto in force were not justified and their legitimate objectives could also be attained by means of other alternatives which have less effect, or even no effect on the players' right to freedom of movement.<sup>82</sup>

In the US, there was a period, following *Smith v Pro Football, Inc* ('*Smith*'),<sup>83</sup> when competitive balance was not seen as a valid justification for a restraint of trade, but this changed in 2010 in the Supreme Court case *American Needle v National Football League*.<sup>84</sup> It recognised that 'competitive balance was a legitimate and important interest'<sup>85</sup> which needed to be considered when determining whether a restraint of trade was unjust.

Three jurisdictions where the law relating to the restraint of trade is now statute-based still utilise the concept of 'reasonableness' in determining whether a restraint should be allowed to meet the need for competitive balance within a sporting league. In reality, therefore, the law is still as it was determined in *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd* ('*Nordenfelt*'),<sup>86</sup> where a restraint was held to be valid if 'it is reasonably necessary to protect the legitimate interests of the party imposing the restraint; not unreasonable in regard to the party on whom the restraint is imposed; and not injurious to the public'.<sup>87</sup>

## 2.7 Conclusion

This chapter has highlighted a number of differences between normal businesses and businesses involving professional team sports. Significant areas of difference, such as fixed supply and quality of performance, need to be acknowledged, accepted and managed. Emphasis needs to be placed on the positive aspect of fixed supply, focusing on the rarity of the occasion and making the most of the opportunity through television broadcasting and other technological means of streaming matches. Similarly, regarding quality of performance, emphasis needs to be placed on the uncertainty and excitement that this can cause, often giving an underdog team a chance to beat a more favoured opponent.

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<sup>82</sup> Ibid 741.

<sup>83</sup> *Smith v Pro Football Inc* 593 F 2d 1173 (1978) ('*Smith*').

<sup>84</sup> *American Needle Inc v National Football League* 130 S.Ct. 2201, 2217 (2010).

<sup>85</sup> Ibid. See also Brian Bodansky, 'Kicking the Penalty: Why the European Court of Justice should allow Salary Caps in UEFA' (2013) 36(1) *Fordham International Law Journal* 160, 173.

<sup>86</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company Ltd* (1894) AC 535 ('*Nordenfelt*').

<sup>87</sup> Chris Davies, 'Labour Market Controls in Light of UEFA's Financial Fair Play Regulations' (2012) 33(10) *European Competition Law Review* 435, 435.

There are two main areas of difference which are particularly significant and these are competitive balance and financial stability. Unlike other businesses, professional team sports rely upon their competitors for the provision of a successful business product. If this is to occur, it is essential that competition between the teams is close and exciting, as support for the product is based on this. It is similarly essential for all the teams in the competition to remain as viable financial entities because the competition (other clubs) would lose credibility if a team (or teams) was to exit the competition due to financial difficulties. It is for these reasons that courts in western world countries have generally been prepared to exercise some latitude towards professional team sports when it comes to the enforcement of their competition law by taking into consideration their unique circumstances.

## CHAPTER 3: PLAYER MOVEMENT AND PAYMENT RESTRAINTS

### 3.1 Introduction

This chapter looks at the labour market restraints used to achieve financial stability and competitive balance, the key requirements of professional team sports that were discussed in Chapter 2. The labour market restraints can be divided into two categories: player movement restraints and payment restraints. Both are important to an examination of the FFP Regulations because European Competition Law promotes competition and looks unfavourably upon restraints which discourage competition. It is therefore necessary when considering the use of restraints to ensure those chosen cause the least impact on competition because the ECJ is likely to look more favourably on them. To achieve this outcome it is always necessary to review the different types of restraint to determine which are the most appropriate in the circumstances.

### 3.2 Restricting Player Movement

#### 3.2.1 The Zoning System

Metropolitan zoning was introduced by the Victorian Football League (VFL) to its Australian Rules football competition in 1897.<sup>88</sup> This tied players to a particular club depending on where they resided, and a player could not play for a different club unless released by the club where he was zoned.<sup>89</sup> Country zoning was first utilised in 1968<sup>90</sup> when country areas in Victoria and parts of New South Wales were divided into zones each designated to a club.<sup>91</sup> A player's club was, therefore, decided by where a player lived and the player could only change clubs after his original club cleared him to move and received a transfer fee.<sup>92</sup> The concept behind the zoning systems was to give clubs equal areas from which to recruit players to create competitive balance between them.<sup>93</sup> The zoning system and, in particular, its clearance rules were held to be in restraint of trade in the following two cases. First, in *Hall v Victorian Football League* ('Hall'),<sup>94</sup> Peter Hall wanted to play for his father's old club South Melbourne but Collingwood refused him the necessary clearance.<sup>95</sup> Second, in *Foschini v*

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<sup>88</sup> Chris Davies, 'The AFL's Holy Grail: The Quest for an Even Competition' (2005) 12 *James Cook University Law Review* 65, 66.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Hall v Victorian Football League* (1982) VR 64, 70 ('Hall').

<sup>95</sup> Davies (n 87) 439.

*Victorian Football League and South Melbourne Football Club ('Foschini')*,<sup>96</sup> the player was denied the right to return from Sydney to play for St Kilda. In each case, the VFL was unable to convince the court that the restrictive measure was necessary for the benefit of its competition.

### 3.2.2 *Retain and Transfer Rule*

A similar problem arose with the retain and transfer rule which was predominantly used in European football. This rule allowed a club to retain a player once the player's contractual period was completed, which prevented him playing for another club, although the player could be transferred to another club if both old and new clubs agreed. A player could only move to another club without his current club's approval if he had not been retained.<sup>97</sup>

In *Eastham v Newcastle United Football Club*,<sup>98</sup> Wilberforce J acknowledged that the retain element of the rule was in restraint of trade, whereas, the transfer element was not so serious a restraint and could even be in the interests of the players.<sup>99</sup> Although the transfer element was subsequently held to be illegal in Australia in *Buckley*,<sup>100</sup> it was not until *Bosman*<sup>101</sup> in 1995 that it was finally acknowledged in Europe that control by a club of a player whose contract had expired was not legally acceptable. In *Bosman*, Advocate-General Lenz, who provided the advisory opinion, concluded that the then rules were in restraint of trade and that there were alternative means of redistributing income between clubs other than a transfer system which restricted the player's statutory right to freedom of movement under Article 48 of the Treaty.<sup>102</sup> In the circumstances, Advocate-General Lenz determined that the transfer element was not a viable option, acknowledging that any benefits which the system did provide to the evenness of competition were not sufficient to justify the heavy restrictions it placed on player movement.

From a practical perspective, the matter was resolved with a subsequent agreement between the European Commission, UEFA and FIFA, which allowed the transfer system to apply to players who were still under contract with their previous clubs.<sup>103</sup> In essence, this amounts to

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<sup>96</sup> *Foschini v Victorian Football League and South Melbourne Football Club*, unreported, Supreme Court of Victoria, 15 April 1983 ('Foschini').

<sup>97</sup> Davies (n 87) 437.

<sup>98</sup> *Eastham v Newcastle United Football Club* (1964) 1 Ch 413.

<sup>99</sup> *Ibid* 431.

<sup>100</sup> *Buckley* (n 79).

<sup>101</sup> *Bosman* (n 81).

<sup>102</sup> Davies (n 87) 438.

<sup>103</sup> *Ibid*.

the player's contract being 'bought out' and avoids the retention element applying when the contract has expired, which was the main issue from the restraint consideration.<sup>104</sup>

### 3.2.3 Reserve Clause

In the US, a reserve clause was initially used by Major League Baseball (MLB) in its player contracts. Contracts were for one year but contained a clause which allowed the club owner either to renew, sell or terminate the contract at the end of its term.<sup>105</sup> Similar to the retain and transfer rule used in European football, the reserve clause sought to control the movement of players after the contractual period had expired. Notwithstanding this, the American courts in *Federal Baseball Club v National League*<sup>106</sup> and *Toolson v New York Yankees*<sup>107</sup> allowed the reserve clause to continue as an exception to the usual restraint of trade provisions contained in the Sherman Antitrust laws. Concerns about the exception were voiced by dissenting judges in *Flood v Kuhn*<sup>108</sup> and ultimately, in 1998, the US Congress passed the *Curt Flood Act*, which stated that baseball was no longer exempt from the antitrust laws.

### 3.2.4 Draft System

The National Football League (NFL) in the US first used the draft system in 1935.<sup>109</sup> It was also adopted by the US National Basketball Association (NBA) in 1947 and replaced the zoning system in the VFL, the forerunner of the Australian Football League (AFL) in 1986.<sup>110</sup> The VFL draft 'was modelled on the system devised by the NFL in 1935'.<sup>111</sup> The basic concept is that 'the last placed team will have first choice of the available players, with the rest of the teams then having a choice in the reverse order in which they finished the previous season's competition, with the process repeated for a second round, third round etc'.<sup>112</sup> This draft is often referred to as the external draft and is the only draft used in the NFL and NBA.<sup>113</sup>

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<sup>104</sup> Ibid 439.

<sup>105</sup> Ibid.

<sup>106</sup> *Federal Baseball Club v National League* 259 US 200 (1922).

<sup>107</sup> *Toolson v New York Yankees* 346 US 356 (1953).

<sup>108</sup> *Flood v Kuhn* 407 US 258 (1972).

<sup>109</sup> *Smith* (n 83).

<sup>110</sup> The cases of *Hall* (n 94) and *Foschini* (n 96) found the zoning system to be an unreasonable restraint of trade. In *Foschini*, Justice Crockett stated that the draft system was a possible alternative to the zoning system.

<sup>111</sup> Chris Davies, 'Draft systems and salary caps in Australian sport' (Paper presented at James Cook University Legal Studies Conference 2011) 2.

<sup>112</sup> Chris Davies, 'Draft Systems in Professional Team Sports and the Restraint of Trade Doctrine: Is the AFL Draft distinguishable from the NSWRL Draft?' (2006) 1(1) *Australian and New Zealand Sports Law Journal* 80, 81. In addition, the AFL has the power to award priority picks. A priority pick is an additional draft pick, awarded, at the discretion of the AFL, to a poor performing club to help improve on-field performance. See 'AFL draft priority pick explained', *The Roar* (Web Page, 28 February 2017)

<<https://www.theroar.com.au/afl/afl-draft-priority-pick/>>

<sup>113</sup> Ibid.



It is used to control the entry of players into a competition.<sup>114</sup> However, the AFL now also has internal and rookie drafts. The internal draft deals with players already playing in the competition, who are out of contract and are not delisted.<sup>115</sup> If these players are not traded by their club they can nominate for the internal draft.<sup>116</sup> The rookie draft gives clubs the chance to select players to go on the club's rookie list.<sup>117</sup>

It can be argued that the draft system assists in providing competitive balance in the leagues where it operates. In the NFL, there have been eight different winners in the last ten years with the only multiple winners being the New England Patriots, who won the Super Bowl three times in this period.<sup>118</sup> Over the 55-year history of the Super Bowl, there have been several winners who have won two years in a row, but no team has ever won three times in a row.<sup>119</sup> It is suggested that these outcomes are testament to a competitively balanced league. In the AFL (initially the VFL), since the draft was introduced in 1986, of the 18 teams in the competition, 17 have played in a preliminary final, 17 have played in a Grand Final – with the only exception being the relatively newly formed Gold Coast Suns – and 13 of the teams have won the Premiership.<sup>120</sup> Once again, the statistics suggest a competitively balanced tournament.

The draft system has been challenged in both the US and Australia. In *Smith*<sup>121</sup> an NFL footballer sustained a career ending injury in 1968 after being drafted the previous year to the Washington Redskins. Smith's aim was not to attack the NFL's draft system per se but to maximise compensation for his injury. His argument was that the NFL draft breached the Sherman Antitrust legislation, and was, therefore, an unreasonable restraint of trade, and if it had not been in place, he could have negotiated a more lucrative deal. The case was ultimately heard in 1978 and the Court determined, by majority, that the 1968 draft was an unreasonable restraint of trade as it prevented other clubs competing for Smith's services.<sup>122</sup> In his

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<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Davies (n 111) 2. Each club can select two select two rookies from their list to play at senior level, but the others are not able to play at that level, unless they are replacing an injured senior player.

<sup>118</sup> 'Official Site of the National Football league', *NFL.com* (Web Page) <[www.nfl.com](http://www.nfl.com)>

<sup>119</sup> Ibid.

<sup>120</sup> 'Official Site of the Australian Football League', *AFL.com* (Web Page, 2020) <[www.afl.com.au](http://www.afl.com.au)>

<sup>121</sup> *Smith* (n 83).

<sup>122</sup> Ibid. The Court acknowledged that there had been changes to the draft rules since 1968 but it was being asked to consider the rules as they were in 1968 and, at that time, they were considered an unreasonable restraint of trade. Contrary to the majority, dissenting Justice MacKinnon argued it was the draft system which created the competitiveness of the competition and led to the public attraction to the game and hence lucrative television contracts.

judgment, Wilkey J<sup>123</sup> suggested that the use of revenue sharing (already used at that time by the NFL for handling television revenue) was a less restrictive method of obtaining competitive balance.

The case of *Adamson v New South Wales Rugby League Ltd* ('*Adamson*'),<sup>124</sup> considered the draft used in the New South Wales Rugby League (NSWRL) that was implemented in 1990 and included both an external and an internal system. The dispute concerned the internal draft, with the complaint relating to the lack of opportunity provided to players to determine for whom they played when their contracts with their current clubs expired. The rules provided that the players had the right to appeal to the Appeals Board which was expected to take into account the best interests of the game, the player and the club, any unreasonable financial or other hardship caused, as well as the service the player in question had given to the game. Only if the Appeals Board allowed the appeal was the player able to participate in the next internal draft. The players were unsuccessful at the court of first instance where Hill J distinguished the earlier case of *Buckley* on the basis that the appeals provisions were reasonable.<sup>125</sup> However, on appeal, the full court (Sheppard, Wilcox, and Gummow JJ) held that the NSWRL's rules relating to the internal draft were 'unreasonable' and therefore, in unlawful restraint of trade. On the question of the reasonableness of the restraint, Wilcox J stated that:

To restrain a person from entering the employment of a particular person, or from following a particular trade or occupation, so as to safeguard the interests of a covenantee by whom that person was once employed or to whom the covenantor has sold a business is one thing; to compel a person – on pain of surrendering his or her occupation altogether – to enter the service of someone whom he or she has not chosen is another. If a rule which has the latter effect can ever be said to be reasonable, the case in justification must be extraordinarily compelling.<sup>126</sup>

On whether the resulting unlawfulness of the restraint was negated by the provision that allowed players to appeal determinations with which they were dissatisfied Gummow J held

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<sup>123</sup> Ibid 1198.

<sup>124</sup> *Adamson v New South Wales Rugby League Ltd (Appeal Case)* (1991) 31 FCR 242 ('*Adamson*').

<sup>125</sup> Andrew Humphreys, 'Sport Restraint of Trade and the Australian Courts: *Adamson v New South Wales Rugby League Ltd*' (1992) 15 *Sydney Law Review* 92, 99. See also *Buckley* (n 79).

<sup>126</sup> *Adamson* (n 124) [268] (Wilcox J).

that it did not (and, in any case, that was not something that was relevant to the question before the court) stating that:

[T]he alleged amelioration of the position of the players, which is said to flow from the existence of the appeal procedure, in my opinion does not go to the central issue on this appeal, namely, whether the restraint, to which the common law doctrine admittedly applies, is no more than the provision of adequate protection to the interests of the League or the clubs.<sup>127</sup>

Thus, the only two decided cases<sup>128</sup> on the draft system have held it to be an unreasonable restraint of trade and yet the draft system persists in the US with the NFL and the NBA, and in Australia with the AFL. The main reason for this appears to be because the players' associations in the competitions where the draft system exists have supported its presence. Notwithstanding this, it is clear that if a court was to review the draft system again it would continue to consider whether the restraint was reasonable as originally determined by Lord Macnaghten in *Nordenfelt*.<sup>129</sup> In the circumstances, it is important that sporting bodies using the draft system maintain a careful watch on their rules to ensure they are fair and reasonable. In this way, the sporting bodies will continue to garner the support of the players as well as prepare themselves for any potential court proceedings that may arise.

It is interesting to note how the AFL developed its father and son rule which enables a son to play for the same club as his father, provided that the father played 100 games for the club.<sup>130</sup> This rule was formulated to prevent it being considered an unreasonable restraint to prohibit a son from playing for the club with which his father had an emotional bond.<sup>131</sup> It means that the player (the son) is excluded from the draft. Under the old process another club could bid on a nominated player (the son) and the club for which the father played 'would only have to match the bid with its next pick'.<sup>132</sup> This could provide an unfair advantage to the club securing the player. A new and more sophisticated rule was instigated in 2015 with a reformed bidding process which gave each draft selection an allocated points value on a sliding scale.<sup>133</sup>

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<sup>127</sup> Ibid [291] (Gummow J).

<sup>128</sup> *Smith* (n 83) and *Adamson* (n 124).

<sup>129</sup> *Nordenfelt* (n 86).

<sup>130</sup> Chris Davies, 'Maintaining the integrity of the AFL's draft and salary cap systems' (2015) *Bond University Sports Law eJournal* 1, 2.

<sup>131</sup> Ibid.

<sup>132</sup> Callum Twomey, 'New bidding system for father-sons, academies', *AFL.com* (Web Page, 21 May 2015) <https://www.afl.com.au/news/116856/new-bidding-system-for-father-sons-academies>

<sup>133</sup> Ibid.

This means that a club nominating a player as a father-son draftee is now forced to match the points value of the pick used by the club bidding for the player.<sup>134</sup> A more exact and fairer process has therefore been introduced.

The AFL also introduced free agency rules from 2012. These rules give certain categories of players the opportunity to change clubs, once they are out of contract. There are two types of free agent, restricted and unrestricted.<sup>135</sup> A restricted free agent can move to another club, provided their present club does not match the offer made. If the club matches the offer, and the player does not want to stay then he must nominate for the draft. Unrestricted free agents are basically players who have played at the same club for eight years.<sup>136</sup> Giving the players some relaxation to the transfer rules is a good example of the AFL lessening the restrictions on player movement and puts them in the same situation as the NFL where free agency has existed for many years.

Another area where trading within the draft has become more relaxed is future draft picks. This was sanctioned by the AFL in 2015, 'albeit with restrictions, including being able to trade only one year ahead and having to make two first-round selections every four years'.<sup>137</sup> The rule change not only gives clubs the scope to make bolder decisions in the implementation of their playing roster, but, importantly, gives players greater transfer opportunities. Davies states that '(o)bviously with relatively few draft choices each year, some considerable restriction is involved here, which is why it may be necessary to allow clubs to trade, not only present year draft picks, but possibly following years as well'.<sup>138</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Andrew McGarry, 'The AFL's trading and free agency period is under way – how does it work?', *ABC News* (online at 7 October 2014) <<https://www.abc.net.au/news/2014-10-07/how-does-the-afl-trading-period-work/5795990>>. See also Jon Pierik and Jared Lynch, 'AFL free agency: how it works', *The Age* (online at 1 October 2012) <<https://www.theage.com.au/sport/afl/afl-free-agency-how-it-works-20121001-26ue3.html>>.

<sup>136</sup> The exception to this provision is players earning one of the top nine salaries at a club, who are eligible for free agency the first time they come out of contract having played at least eight years for the same team.

<sup>137</sup> Marc McGowan, 'Trading future picks won't compromise comp', *AFL.com* (Web Page, 16 June 2017) <<https://www.afl.com.au/news/74376/trading-future-picks-wont-compromise-comp>>. Another complexity is if a club swaps a future round-one pick, it cannot also offload later selections in that draft unless it trades back in, and vice versa. See also Al Paton, 'Who to barrack against next year based on traded 2018 draft picks', *Herald Sun* (online at 24 October 2017) <<https://www.heraldsun.com.au/sport/afl/who-to-barrack-against-next-year-based-on-traded-2018-draft-picks/news-story/7456b90f0fe87279261fd2c9674c8ee9?amp&nk=c2b6a9ecc214fe33dfd948ce9968ca7a-1610936854>>.

<sup>138</sup> Davies (n 112) 99.

### 3.2.5 Quota System

The quota system is another example of restricting player movement. It is used in South Africa to increase the number of black South Africans competing in their national sports teams.<sup>139</sup> It was used by New Zealand Rugby Football Union (NZRFU), now New Zealand Rugby (NZR), to protect its National Provincial Championship (NPC) when rugby union became a professional sport in New Zealand.<sup>140</sup> Introduced in 1995, the system involved dividing the players into bands ‘depending on the level of experience and the competition in which the player had most recently played’.<sup>141</sup> Three bands were established for players of All Black (the New Zealand’s men’s national rugby team) status, namely, star, established and current, ‘while the other bands consisted of one for former All Blacks, one for Super 12 players, and then banding for Senior A NPC, NPC Development, NZ Colt, NZ Under 19 Representative’.<sup>142</sup> Restrictions were then placed on the number of transfers allowing only five banded players to join a provincial union in a year, with the added restriction that each union ‘could transfer only one current All Black in any one year’.<sup>143</sup>

The Commerce Commission granted the NZRFU authorisation to implement its quota under s 58 of the *Commerce Act 1986* (NZ).<sup>144</sup> This was subsequently challenged by the Player’s Association but Justice Smellie upheld the Commerce Commission’s authorisation on the grounds that, in the circumstances, it was a reasonable restraint of trade.<sup>145</sup>

The quota system remained in place in New Zealand until 2006 when it was replaced by a salary cap and new rules governing player transfers.<sup>146</sup> The reason for the new approach was that unless changes were made to the NPC competition, there would be a continuation (and acceleration) of the trend towards uneven competition. It is contended that although the change in the competition structure was a major reason for moving to a salary cap arrangement, the use of the quota system as a sole means of restraint had not been successful in creating an even competition within New Zealand rugby, with the NPC experiencing ‘a

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<sup>139</sup> Siya Mnyanda, ‘Imposing racial quotas as a vital step forward for South African sport’, *The Guardian* (online at 29 April 2016) <<https://www.theguardian.com/profile/siya-mnyanda>>.

<sup>140</sup> Davies (n 87) 440.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> ‘Determination Decision 580 New Zealand Rugby Football Union’, *Commerce Commission (NZ)*, (Web Page, 2 June 2006) <[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/66921/comcom-nzrfinaldetermination.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/66921/comcom-nzrfinaldetermination.pdf)>.

significant competitive imbalance whereby semi-final appearances and championship winners were dominated by the few biggest population centres'.<sup>147</sup>

### 3.3 *Restricting Player Payment*

#### 3.3.1 *Maximum Wage*

A maximum wage restraint means that a person subject to the provision can earn no more than the maximum wage if the restraint is properly enforced. This restraint has been 'utilised to try and maintain a limit on player salaries'.<sup>148</sup> It 'sets an upper limit on how much each and every player can be paid'.<sup>149</sup> It is particularly useful in fledgling competitions where income is often initially low and minimising expenses is paramount. The maximum wage is also more useful where you have players of more equal ability and where there is no express need to differentiate the payments made to players,<sup>150</sup> which is often the case in a newly formed competition.

Its earliest use was in the English Football League (EFL) in 1901 where a maximum wage was fixed at £4 per week. Despite a reduction in the maximum wage from £9 to £8 per week in 1922, the maximum wage generally increased over the years so that by the late 1950s it had reached £20 per week.<sup>151</sup> It was originally introduced to assist the smaller clubs, giving them the opportunity to compete with those in the bigger cities. To an extent it achieved its aim with a diversity of teams, including some smaller clubs, winning the First Division title in the first thirty years of the maximum wage, until the domination of Arsenal in the 1930s.<sup>152</sup> It also helped the vast majority of clubs survive financially as it considerably restricted the clubs' major expense of wages. Revenue opportunities, at the time the maximum wage was introduced to English football, were limited and were based around ticket sales, which could be fickle as they were largely dependent on the weather. A large crowd would not be expected to attend a game played in inclement weather, particularly at a time when many clubs were not able to offer covered stands to protect supporters from the elements. Sponsorship was

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<sup>147</sup> Ibid 36.

<sup>148</sup> Chris Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246, 247.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid 248.

<sup>151</sup> Stephen Dobson and John Goddard, 'Performance, revenue, and cross subsidization in the Football League, 1927–1994' (1998) LI 4 *Economic History Review* 763, 773–774.

<sup>152</sup> David McArdle, *From Boot Money to Bosman: Football, Society and the Law* (Cavendish Press 2000) 49. Winners between 1901 and 1930 included smaller clubs such as West Bromwich Albion, Burnley and Huddersfield. Whereas, in the decade prior to the introduction of the maximum wage, the competition had been dominated by Aston Villa, a large club situated in the heavily populated city of Birmingham.

minimal and there were no broadcasting rights available for sale. Consequently, it was very important that a club's expenses were kept as low as possible.

However, the maximum wage did create the problem of how to properly reward star players,<sup>153</sup> who were, prima facie, earning only a little more than players of lesser ability.<sup>154</sup> The more accomplished players were able to add to their income through benefit matches, bonuses for cup ties, talent money and playing Internationals and there was also an opportunity to increase income through advertising and endorsing products.<sup>155</sup> But eventually the Football Association came under heavy pressure from the Players' Association to dispense with the maximum wage, and this duly occurred in 1961.

In 1984, the legality of the maximum wage, which had continued in the Northern Irish Football League, was challenged in *Johnston v Cliftonville Football and Athletic Club Ltd* ('*Johnston*').<sup>156</sup> Johnston, a part-time footballer argued that the maximum wage was an unreasonable restraint of trade. Murray J noted that although the maximum wage did not prevent Johnston from playing for other teams in the league, it did restrict him as to the financial terms on which he was to play.<sup>157</sup> The judge concluded that Johnston was hindered in his right to negotiate an essential and basic issue of his contractual arrangement, namely the amount of his salary,<sup>158</sup> and proceeded to determine that the maximum wage was an unreasonable restraint of trade.<sup>159</sup>

The outcome of the case alone did not bring the maximum wage to an end, but it has not been used in sport as much in recent years because the financial circumstances of sports have generally improved due greatly to the income obtained from television and media rights.

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<sup>153</sup> Davies (n 148) 247.

<sup>154</sup> Ibid.

<sup>155</sup> Matthew Taylor, 'Beyond the Maximum Wage: The Earnings of Football Professionals in England, 1900–39' (Autumn 2001) 2(3) *Soccer and Society* 101, 105–110. Arsenal player, Eddie Hapgood, for instance, was able to supplement his income through fashion modelling and advertising chocolate. See Jeffrey Hill, *Hapgood, Edris Albert (Eddie) (1908–1973)* (Oxford University Press 2004). Tommy Lawton managed to earn just over £531 in the 1938/39 season, when he was leading goal scorer for League Division 1 Champions, Everton. See Taylor, above n 63, 111. In 1956/57, members of the Manchester United team who were also England internationals were earning £1677 per year. See 'How footballers wages have changed over the years: in numbers', *Daily Telegraph* (online at 18 January 2011) <<https://www.telegraph.co.uk/sport/football/competitions/premier-league/8265851/How-footballers-wages-have-changed-over-the-years-in-numbers.html>>. The sum of £1677 was made up of £744 in wages, £72 in league match bonuses, £45 in league talent money, £60 in European Cup bonuses, £150 in accrued benefit, £80 from Provident Fund credit, £56 in FA Cup bonuses, £50 in FA Cup talent money, £400 from international match fees, and £20 from an inter-League match fee.

<sup>156</sup> *Johnston v Cliftonville Football and Athletic Club Ltd* [1984] NI 9 ('*Johnston*') cited in Davies (n 148) 248.

<sup>157</sup> Ibid 19.

<sup>158</sup> Ibid 20-21.

<sup>159</sup> Ibid 23.

Dabscheck states that ‘(d)ifferent sports have sought to limit the income that can be paid to an individual player...With the increasing flow of revenue into sport, especially associated with broadcasting, such rules were swept aside in the 1970s.’<sup>160</sup> However, it is still sometimes used in the case of fledgling competitions, where revenue is generally low and teams need to restrict their expenses, the greatest of which is wages.

The US Women’s National Basketball Association (WNBA) still utilises the maximum wage to some extent. In 2017, the maximum wage was \$121,500 per annum.<sup>161</sup> But this figure rose substantially to \$215,000 in 2020, together with the possibility of additional performance bonuses and opportunities potentially to revenue share in the future.<sup>162</sup> As this particular competition was founded in 1981 and has therefore ‘matured’ significantly, it is not surprising that payments beyond the strict maximum wage, such as performance bonuses, are being paid and the possibility of revenue sharing is being discussed. The sport is clearly moving beyond the fledgling stage.

Even newly formed competitions are beginning to adopt alternative methods of payment to players rather than using the maximum wage. In 2020, Netball Australia announced a new collective bargaining agreement with the national league’s 80 players sharing a pool of approximately \$6 million.<sup>163</sup> This meant that each of the eight teams would receive roughly \$750,000 to be spread among 10 players.<sup>164</sup> A minimum wage was set at \$33,000 from 2021 which, since there is no maximum wage, allows some players to earn sums in excess of the average of \$75,000 per player.<sup>165</sup>

### 3.3.2 Salary Cap

The salary cap has been described as ‘an artificial labour market control that limits the total sum an individual club may spend on payments to its players’.<sup>166</sup> Although Lindholm

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<sup>160</sup> Braham Dabscheck, ‘Sport and the Labour Market’ (May 2007) 21(2) *Ecodev* 2.

<sup>161</sup> Pat Borzi, ‘WNBA salaries in focus as Finals tip off’, *ESPN* (Web Page, 24 September 2017) <[https://www.espn.com.au/wnba/story/\\_/id/20797116/wnba-salaries-focus-finals-tip-off](https://www.espn.com.au/wnba/story/_/id/20797116/wnba-salaries-focus-finals-tip-off)>.

<sup>162</sup> Dan Feldman, ‘New WNBA CBA increases average salary to nearly \$130K, maximum salary above \$500K’, *NBC Sports* (Web Page, 14 January 2020) <<https://nba.nbcsports.com/2020/01/14/new-wnba-cba-increases-average-salary-to-nearly-130k-maximum-salary-above-500k/>>. See also Howard Megdal, ‘WNBA makes ‘Big Bet on Women’ with a new contract’, *New York Times* (online at 14 January 2020) <<https://www.nytimes.com/2020/01/14/sports/basketball/wnba-contract-collective-bargaining-agreement.html>>.

<sup>163</sup> ‘Top netballers agree to updated deal’, *Netball Australia* (Web Page, 14 February 2020) <[<sup>164</sup> \*Ibid.\*](https://netball.com.au/news/top-netballers-agree-updated-deal#:~:text=Australia's%20top%20netballers%20will%20remain,the%202020%20and%202021%20seasons>.”</a>>.</p></div><div data-bbox=)

<sup>165</sup> *Ibid.*

<sup>166</sup> Tony Buti, ‘Salary Caps in Professional Team Sports: an Unreasonable Restraint of Trade’ (1999) 14 *Journal of Contract Law* 130.



differentiates team salary caps as those regulating ‘the total payroll of a team’<sup>167</sup> and player salary caps as those which ‘provide a maximum salary for an individual player’,<sup>168</sup> normally the salary cap system ‘is a collective limit’ with ‘no direct restrictions on the amount a club may pay any one player’.<sup>169</sup>

Two main types of salary cap exist, the hard cap and the soft cap.<sup>170</sup> The hard cap ‘sets a specific limit on the amount a team may pay its players and teams may not exceed this amount in any circumstances’.<sup>171</sup> The soft cap ‘sets a maximum amount...but allows its teams to exceed the cap in specific situations’.<sup>172</sup> Another possible distinction between salary caps is how they are applied differently to the teams in a competition. Davies uses the terms ‘even’ and ‘uneven’ to describe these two types of caps.<sup>173</sup> By ‘even’ he is referring to situations where ‘the same limit applies to each club’ and ‘uneven’ is ‘where a different amount exists for each club, depending on the governing body’s view of the club’s specific financial situation’.<sup>174</sup> The majority of caps tend to be even, in that competition administrators tend to have the same set of salary cap rules which apply to all the teams in the competition. Occasionally, examples of uneven rules apply. For instance, the AFL provided new teams, including the Brisbane Lions<sup>175</sup> and the Gold Coast Suns, with extra salary cap allowances, and the Sydney Swans and the Greater Western Sydney Giants both benefitted from a 7% housing allowance due to their locations in Sydney.<sup>176</sup>

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<sup>167</sup> Johan Lindholm, ‘The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play’ (2011) 12(2) *Texas Review of Entertainment & Sports Law* 189, 194.

<sup>168</sup> Ibid. Lindholm also points out there can be a combination of the two and he gives the example of the National Hockey League in the US, which in 2010 had a US\$59.4 million team salary cap and a US\$11.88 million player salary cap.

<sup>169</sup> Buti (n 166) 130. There are some exceptions with the NBA having a maximum salary for its players.

<sup>170</sup> Alan M. Levine, ‘Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues’ (1995) 6(1) *Fordham Intellectual Property, Media and Entertainment Law Journal*, 243, 245. Levine provides the NFL as a hard salary cap example and the NBA as a soft cap example.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid 245–246. The word ‘relative’ is sometimes used in place of ‘soft’ with the meaning being seen as the same. See Johan Lindholm, ‘The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play’ (2011) 12(2) *Texas Review of Entertainment & Sports Law* 189, 194.

<sup>173</sup> Davies (n 148) 249. See also Buti (n 166) 137–138.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 250. The salary caps of the Brisbane Lions and the Sydney Swans were higher by 10% and 15%, respectively, to compensate ‘for more out of state players than the other teams and, in the case of Sydney, a higher cost of living.’

<sup>176</sup> Ibid. The Sydney Swans originally had an extra salary cap allowance but this ended in 2006 but the club did retain its 7% housing allowance.

The main benefits of a salary cap are seen as being its capacity for ‘increasing competitive balance and maintaining financial stability’.<sup>177</sup> There is, however, some debate as to whether the use of salary caps does create greater competitive balance. From a theoretical position it would be natural to expect that the impact of salary caps would improve competitive balance. Kesenne, for instance, found that applying a salary cap will increase competitive balance and provide a more equal salary distribution between the top and regular players.<sup>178</sup> He also maintained that a salary cap ‘increases the profits of both the big and the small clubs’.<sup>179</sup> On the other hand, Staudohar stated that ‘(s)alary caps and payroll tax may seem beneficial to owners, but their effects appear to be more symbolic and cosmetic than fundamental’<sup>180</sup> on the basis that ‘[p]layer salaries are mostly determined by market conditions’.<sup>181</sup> Totty and Owens, measuring competitive balance by considering evidence from the NBA, NFL and National Hockey League (NHL) over the period from the 1978/79 season (1979/80 for the NHL) to the 2009/10 season, found ‘no evidence to suggest that salary caps have improved competitive balance in a statistically significant manner’.<sup>182</sup> They argue that this is not necessarily surprising if one acknowledges that a team will be willing to pay more for a player, if that player is worth more to that particular team.<sup>183</sup> Teams based in larger markets are often able to generate more revenue from a player due to a bigger fan base, larger merchandise sales and greater media coverage.<sup>184</sup> They conclude that the ‘(v)arying ability to generate revenue is the root cause of competitive imbalance and a salary cap does not change this’.<sup>185</sup>

While more up-to-date empirical research would be useful in resolving this matter, the diversity of winners in competitions utilising a ‘hard’ salary cap can be examined, and this appears to support the view that it does assist competitive balance. As discussed in Chapter 3.2.4, the NFL and the AFL also use draft systems and some revenue sharing. In the case of the NFL, there have been 13 different winners from 33 competitions and, in the case of the

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<sup>177</sup> Helmut Dietl, Markus Lang and Alexander Rathke, ‘The Effect of Salary Caps in Professional Team Sports on Social Welfare’ (Working Paper Series ISSN 1660-1157 No 72, Institute for Strategy and Business Economics University of Zurich, January 2008) 2.

<sup>178</sup> Stefan Kesenne, ‘The Impact of Salary Caps in Professional Team Sports’ (2000) 47(4) *Scottish Journal of Political Economy* 422–430.

<sup>179</sup> *Ibid.*

<sup>180</sup> Paul Staudohar, ‘Salary Cap in Professional Team Sports’ (Spring 1998) *Compensation and Working Conditions* 3, 10.

<sup>181</sup> *Ibid.*

<sup>182</sup> Evan Totty and Mark Owens, ‘Salary Caps and Competitive Balance in Professional Sports Leagues’ (2011) 11(2) *Journal for Economic Educators* 46, 54.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.*

AFL, 15 distinct champions from 36 tournaments, since the introduction of the salary cap for their sports. This provides different winners of their competitions at approximately 40% and 42%, respectively. The NRL which operates on only a salary cap and a \$13 million annual grant to each of the 16 clubs has produced 12 different winners from 30 competitions since the restructure of the NRL in 1998, which equates to 40%. These figures are noticeably higher than those of the English Premier League (EPL) where no 'hard' salary cap exists, and where there have been seven different champions in the 28 seasons of the tournament, which produces a much lower percentage of different winners at only 25%. Other examples from European national leagues produce even lower percentages with PSG, Juventus, and Bayern Munich dominating their competitions in France, Italy and Germany, respectively.

The financial viability of clubs can also benefit from a salary cap. Whitney has pointed out the lengths to which clubs are prepared to go in their quest to secure the best players and how this can lead clubs into financial trouble.<sup>186</sup> It therefore seems that, by restricting the amount of money spent on salaries, the cap can assist clubs to reduce their financial liability. The evidence also seems to suggest this is an area of potential temptation where clubs can seriously overspend in an attempt to obtain better playing talent than rival teams, so a cap provides a clear restraint.

Salaries are the key expense for clubs so if salaries are capped the clubs should be better placed financially. In 2018 NFL owners received \$255 million in national revenue with a salary cap set at \$177.2 million.<sup>187</sup> This meant the Green Bay Packers, which also earned \$196 million in local revenue, had an operating income of \$38.5 million after expenses.<sup>188</sup> The Dallas Cowboys, the richest team in the NFL, earned \$864 million in revenue and had an operating income of \$365 million.<sup>189</sup> Some competitions, however, are not able to produce as much revenue as the NFL and find the salary cap limitation more protective than income producing. The Hyundai (A-League) men's soccer league in Australia, for instance, uses the salary cap to ensure 'clubs are not put in a position where they are forced to spend beyond their financial capabilities in order to stay competitive on the field'.<sup>190</sup> Nevertheless, a salary

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<sup>186</sup> James Whitney, 'Bidding till bankrupt: Destructive competition in professional team sports' (1993) 31(1) *Economic Inquiry* 100–115.

<sup>187</sup> Jacob Eckstein, 'How the NFL makes money', *Investopedia* (Web Page, 24 September 2019) <<https://www.investopedia.com/articles/personal-finance/062515/how-nfl-makes-money.asp>>.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> 'Salary Cap System', *Hyundai A-League* (Web Page, 2017) <<https://www.a-league.com.au/salary-cap-system>>.

cap does not always lead to financial well-being. The Hobart Devils in the Australian NBL was subject to a salary cap, which it honoured, but the club survived only as long as it received financial assistance from the NBL management. When financial assistance was withdrawn in 1996, the club was unable to survive as its expenses exceeded its revenue.<sup>191</sup> Despite that, however, it is clear a salary cap can assist with financial viability in some cases.

Although the salary cap has advantages, it has the potential to create difficulties in some areas. The enforcement of salary caps is one such area with scope for deception to occur. Breaches can take a long time to be discovered, or even go undetected. There have been several examples of salary cap breaches in various sports across the world. In 2000, for instance, NBA club, the Minnesota Timberwolves, was found guilty of breaches and punished with a \$3.5 million fine and forfeited a number of draft picks over a five year period.<sup>192</sup> In 2004, NFL team, the Denver Broncos, was fined \$968,000 and stripped of its third round draft pick after it was discovered that it had deferred payments of up to \$29 million to players John Elway and Terrel Davis between 1996 and 1998.<sup>193</sup> In Australia, the Canterbury Bulldogs, and the Parramatta Eels, and more recently the Manly Sea Eagles, have all been penalised for salary cap breaches.<sup>194</sup> Although a considerable number of breaches have occurred in the AFL these have been relatively minor, or inadvertent, apart from the Carlton football club which was fined \$987,000 and lost several draft picks after it made undeclared payments to four of its players totalling \$1.37 million between 1998 and 2001 in a deliberate breach.<sup>195</sup>

Those cases, however, are minor in comparison to the cases of NRL club Melbourne Storm and Saracens Rugby Football Club which plays in the Premiership Rugby in England. These cases highlight the main lines of deception that take place with the use of a second set of

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<sup>191</sup> Buti (n 166) 138.

<sup>192</sup> Curtis Figon, '7 biggest salary cap scandals in sport', *FTBL* (Web Page, 13 April 2015) <<https://www.ftbl.com.au/gallery/7-biggest-salary-cap-scandals-in-sport-422302>>.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid. See also Chris Barrett, 'Melbourne Storm stripped of premierships for salary cap breaches', *The Sydney Morning Herald* (online at 22 April 2010) <<https://www.smh.com.au/sport/nrl/melbourne-storm-stripped-of-premierships-for-salary-cap-breaches-20100422-td91.html>>. 'Paramatta Eels salary cap sanctions ratified by NRL as 12-point penalty, \$1m fine and board ban kick in', *ABC News* (online at 9 July 2016) <<https://www.abc.net.au/news/2016-07-09/parramatta-eels-salary-cap-sanctions-ratified/7582924>>. David Riccio, 'Manly Sea Eagles hanging on NRL deliberation over alleged salary cap breaches', *The Daily Telegraph* (online at 1 March 2018) <<https://www.dailytelegraph.com.au/sport/nrl/teams/sea-eagles/manly-sea-eagles-hanging-on-nrl-deliberation-over-alleged-salary-cap-breaches/news-story/add35aaa3ad3097abc1bf4a9dc0b9769>>.

<sup>195</sup> 'Carlton pushed to the brink by \$930,000 fine', *Footy Stats* (Web Page, 23 November 2002) <[www.footystats.freesevers.com](http://www.footystats.freesevers.com)>.

books, as occurred in the Melbourne Storm example, and payment through third parties to players which happened in the Saracens case.

The Melbourne Storm breaches occurred over a five year period and were discovered in 2010, with the team subsequently being stripped of the 2007 and 2009 premierships, together with the revocation of its 2010 World Club Challenge title.<sup>196</sup> It was discovered that the club had kept a dual contract and bookkeeping system in place which hid \$3.78 million in payments to players outside the salary cap.<sup>197</sup> This involved invoices to third party suppliers being inflated by up to \$20,000 above the actual value of the services provided, with the inflated sums being paid directly to the players by those suppliers.<sup>198</sup> The Melbourne Storm was fined \$1,689,000 and required to refund all prize money obtained during the breach period. They also forfeited the eight points earned in the 2010 season and were prevented from receiving any further points for the 2010 season.<sup>199</sup>

The salary cap breach by the Saracens Football Club was also extensive and is an example of payments being made through third parties which, in this case, involved the owner and former chairman of Saracens, Nigel Wray. In November 2019, Saracens was fined £5.3 million and had 35 championship points deducted for breaching Premiership Rugby's £7 million salary cap in the 2016–17, 2017–18 and 2018–19 seasons by £1.1 million, £98,000 and £906,000, respectively.<sup>200</sup> The breaches arose through Wray entering into property purchases with several players including Billy and Mako Vunipola, Richard Wrigglesworth, Mako Itoje, and Chris Ashton, which he alleged were joint ventures but which were held to be loans and

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<sup>196</sup> Ian Munro, 'Melbourne Storm stripped of everything', *WA Today* (online at 23 October 2010) <<https://www.watoday.com.au/sport/nrl/melbourne-storm-stripped-of-everything-20100423-gebokw>>. See also Katherine Firkin, 'Fans are feeling the pain of the Melbourne Storm's penalty', *Herald Sun* (online at 23 April 2010) <<https://www.heraldsun.com.au/sport/fans-are-feeling-the-pain-of-melbourne-storms-penalty/story-e6frf9if-1225857176581?sv=66c844090762da6490e9737c7fb9221a>> and Chris Barrett, 'Melbourne Storm stripped of premierships for salary cap breaches' *The Sydney Morning Herald* (online at 22 April 2010) <<https://www.smh.com.au/sport/nrl/melbourne-storm-stripped-of-premierships-for-salary-cap-breaches-20100422-td91.html>>.

<sup>197</sup> Karl DeKroo, 'How Melbourne Storm bought its way to the top with salary cap rort', *The Courier Mail* (online at 22 April 2010) <<https://www.couriermail.com.au/sport/nrl/how-melbourne-storm-bought-its-way-to-top-with-salary-cap-rort/story-e6frep66-1225857165083>>. See also Stuart Honeysett, 'Shocking end to the Melbourne Storm era', *The Australian* (online at 23 April 2010) <<https://www.theaustralian.com.au/news/sport/shocking-end-to-the-melbourne-storm-era/story-e6fig7mf-1225857195771>>. See also Josh Rakic, 'Melbourne Storm salary cap scandal', *The Sydney Morning Herald* (online at 23 April 2010) <<https://www.smh.com.au/sport/nrl/nrl-claims-more-scandal-to-come-20100424-1kmj.html>>.

<sup>198</sup> *Ibid.*

<sup>199</sup> Munro (n 196) 2.

<sup>200</sup> Martha Kelner, 'Revealed: How Saracens broke rugby's salary cap rules', *Sky News* (Web Page, 23 January 2020) <<https://news.sky.com/story/revealed-how-saracens-broke-rugbys-salary-cap-rules-11915269>>.

therefore considered player income for salary cap purposes.<sup>201</sup> An overpayment of £800,000 was also made by Wray and two other directors to Itoje for a 30% share in his image rights company with the overpayment being made so the club could meet its salary cap allowance.<sup>202</sup> There were also three payments of £95,000 made to Itoje by a hospitality company run by Wray's daughter but no evidence of Itoje having attended or having been involved in any hospitality events, which made the payments a salary benefit and not a commercial arrangement.<sup>203</sup> The Saracens club was subsequently relegated to a lower division choosing 'to move down a division rather than open past financial records for a full forensic audit'.<sup>204</sup>

The seriousness of the Melbourne Storm and the Saracens examples and the fact they went undiscovered for considerable periods of time demonstrates the difficulty in exposing and enforcing salary cap breaches.<sup>205</sup> However, it is probable these examples will act as a severe deterrent to other clubs thinking of acting in a similar way, bearing in mind the breaches were eventually detected and the severity of the punishments imposed.<sup>206</sup>

Another difficulty with the salary cap is its prohibitive nature and whether it would be acceptable to the major stakeholders involved in European football, the players and the football clubs. Although the salary cap operates in various sports, principally in North America and Australia, it has never been determined by a court that it is a reasonable restraint of trade. The competitions in which it does apply have been prepared to accept it, although a similar acceptance from European football may not be forthcoming.

Players can be affected by a salary cap in two main ways. First, they might receive a lesser wage and second, they might be unable to choose their employer. Moran argues that '(a) salary cap is a regulatory measure that a cartel imposes to reduce the earnings of the best and most valuable workers. Those workers are, as a consequence, underpaid.'<sup>207</sup> Buti states that '[s]alary cap systems present major concerns in relation to players' liberties to trade their athletic skills'.<sup>208</sup> With a limited amount of salary funding available due to a cap, there will

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<sup>201</sup> Ibid 6.

<sup>202</sup> Ibid 11.

<sup>203</sup> Ibid 9.

<sup>204</sup> Ibid 4.

<sup>205</sup> Marcus Playle, 'In Control: Salary Caps and other Labour Control Mechanisms within New Zealand Rugby' (2015) 10(1) *Australian and New Zealand Sports Law Journal* 97, 120.

<sup>206</sup> Davies (148) 258.

<sup>207</sup> Alan Moran and Richard Allsop, 'Are Salary Caps a Problem?' (2010) 62(2) *The Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs* 18–19.

<sup>208</sup> Buti (n 166) 139.

be less funds available for players and clubs may have to cull elements of their playing staff to meet cap obligations.<sup>209</sup>

Consequently, it is probable that any proposal for a salary cap will immediately raise concerns with a playing group where it is being considered. Examples of this occurred in the MLB and the NHL. The MLB was unable to play half of its games in the 1994 and 1995 seasons due to a lockout because the clubs wanted to introduce a salary cap to its competition, to which the players would not agree.<sup>210</sup> The NHL lost the last part of its 1994/95 season and all of its 2004/5 season due to disputes between club owners and players over the proposal to introduce a salary cap.<sup>211</sup> This seems to happen particularly where the players in the competition have not experienced payment restrictions prior to the proposed introduction of the salary cap, which was the case in the MLB and the NHL. In other examples like the NFL,<sup>212</sup> AFL,<sup>213</sup> NRL<sup>214</sup> and NZR,<sup>215</sup> where there had been player restraints in place prior to the introduction of the salary cap, the players seemed more receptive to the prospect.

The likelihood of a salary cap being accepted can also depend on the nature of the clubs involved. As discussed in Chapter 2, club owners generally fall into two main categories: profit maximisers and utility maximisers.<sup>216</sup> The former seek to make a profit from their ownership, whereas the latter seek playing success.<sup>217</sup> With the general aims of a salary cap being to provide financial viability and competitive balance, it is clear that the two categories of club owners will be affected differently by the cap's implementation. It is probable the

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<sup>209</sup> Prior to their recent salary cap scandal, Saracens was concerned it would lose its homegrown players as their careers progressed because their salaries would not allow the club to retain them under the current cap. Saracens proposed that a financial limit should be placed on this category of players so far as the cap is concerned, which would allow the club that has nurtured these players the chance of securing their long term services. See Gerard Meagher, 'Saracens fear salary cap rules could cost them homegrown stars like Maro Itoje', *The Guardian* (online at 24 August 2017) <<https://www.theguardian.com/sport/2017/aug/23/saracens-salary-cap-rules-maro-itoje>>.

<sup>210</sup> Ross Newhan, 'Players Union Rejects Owners' Salary Cap: Baseball Negotiations will continue Wednesday, but a strike day is expected by July 31', *Los Angeles Times* (online at 19 July 1994) <<https://www.latimes.com/archives/la-xpm-1994-07-19-sp-17327-story.html>>.

<sup>211</sup> Associated Press, 'Lockout over salary cap shuts down NHL', *ESPN* (Web Page, 17 February 2005) <<https://www.espn.com/nhl/news/story?id=1992793>>.

<sup>212</sup> The NFL had had its draft system in place since 1935. It introduced its salary cap in 1994.

<sup>213</sup> The AFL through its forerunner, the VFL, had been using the zoning system since 1897 when it introduced its salary cap in 1987.

<sup>214</sup> The NRL's forerunner, the NSWRL, had had a player's draft and salary cap in place since 1990, although the draft system had ended in 1991 as it was held in the case of *Adamson* (1991) to be in restraint of trade. The NRL continued with a salary cap when it took over from the NSWRL in 1998.

<sup>215</sup> NZR's forerunner, NZRFU and later NZRU had a quota system in place from 1995. Its salary cap arrangements commenced in 2010.

<sup>216</sup> Sloane (n 48) 121.

<sup>217</sup> *Ibid.*

salary cap will assist profit maximisers in keeping expenses down and this should assist them in making a profit. North American owners tend to be of this type, and they will also have the benefit of any competitive balance the salary cap may bring. There may also be a benefit for North American owners because their competition is of a closed variety with no promotion and relegation. Consequently, the importance of competitive balance is heightened with the need for close games because the issues of promotion and relegation are non-existent.

In Europe, the utility maximisation approach is generally more favoured. Clubs pursuing a utility-focused approach can find the salary cap rather restricting. This would certainly be the case where the owner of a club is prepared to invest more in the club than the salary cap allows. It is evident that owners who are looking to buy success need to have a large amount of money. Abramovich<sup>218</sup> and Sheikh Mansour<sup>219</sup> may have managed to achieve this with Chelsea and Manchester City, respectively,<sup>220</sup> but other owners need a similar magnitude of wealth if they are to succeed. There are several examples of owners who have tried but failed.<sup>221</sup> However, some owners may prefer to seek their own success rather than learn from the failings of others. Further, in European football there are some very wealthy clubs that

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<sup>218</sup> Roman Abramovich purchased Chelsea in June 2003. Accounts for Fordstam Limited, Chelsea's ultimate holding company, reveal that Abramovic is owed over £1 billion by the club for investment money provided to the club. The loans are interest free and repayable on 18 months' notice. Abramovich was reported as being worth between £5.85 and £9.2 billion. See Paul Kelso, 'Chelsea owner Roman Abramovich counts the cost of European failure: £740 million and rising', *The Telegraph* (online at 8 April 2011) <<https://www.telegraph.co.uk/sport/football/teams/chelsea/8436348/Chelsea-owner-Roman-Abramovich-counts-the-cost-of-European-failure-740-million-and-rising.html>> and Daniel Tiluk, 'What does Chelsea's £1 billion 'Debt' Mean for the Club's Future', Bleacher Report (Web Page, 15 May 2015) <<https://bleacherreport.com/articles/2458623-what-does-chelsea-1-billion-in-debt-mean-for-the-clubs-future>>. Abramovich's worth in 2021 is estimated at about £11 billion See Forbes, 'The World's Real-Time Billionaires' *Forbes* (online at 5 March 2021) <<https://www.forbes.com/real-time-billionaires>>.

<sup>219</sup> Sheikh Mansour bin Zayed al Nahyan purchased Manchester City in 2009. With an estimated net worth of £17 billion and a family fortune of at least £1 trillion, he is estimated to have invested more than £650 million in Manchester City. See Louise Armistead, 'Sheikh Mansour bin Zayed Al Nahyan has a deep love of sports and deeper pockets', *The Telegraph* (online at 2 September 2008) <<https://www.telegraph.co.uk/sport/football/teams/manchester-city/2664795/Sheikh-Mansour-bin-Zayed-Al-Nahyan-has-a-deep-love-of-sport-and-deeper-pockets-Football.html>> and Jason Burt, 'Sheikh Mansour's blueprint for success at Manchester City could cost rivals dear', *The Telegraph* (online at 3 September 2010) <<https://www.telegraph.co.uk/sport/football/teams/manchester-city/7978555/Sheikh-Mansours-blueprint-for-success-at-Manchester-City-could-cost-rivals-dear.html>>.

<sup>220</sup> See also (n 55).

<sup>221</sup> Alexandre Gaydamak purchased Portsmouth in 2006 but was forced to sell the club in 2009 after the Global Financial Crisis. Portsmouth went into administration twice after his departure and is now owned by the Pompey Supporter' Trust. See David Conn, 'What's gone wrong at Portsmouth?', *The Guardian* (online at 6 February 2010) <<https://www.theguardian.com/football/2010/feb/05/portsmouth-balram-chainrai-sacha-gaydamak>> and Jim Holden, 'Portsmouth highlights the rotten culture of football', *Express* (online at 25 April 2010) <[www.express.co.uk](http://www.express.co.uk)>. Rangers, originally owned by Sir David Murray and subsequently transferred to Craig Whyte went into liquidation on 31 October 2012. See Brian Ponsonby, 'Sir David Murray and the fall of Rangers Football Club', *BBC News* (online at 15 December 2012) <<https://www.bbc.com/news/uk-scotland-glasgow-west-14880473>>



currently hold a large financial advantage over their rivals, and it is proposed that they would be unwilling to hand over that advantage by accepting a salary cap restraint. This will be considered in more detail in Chapter 9.

### 3.3.3 Revenue Sharing

Revenue sharing is another measure that is used to help create a more even distribution of revenue with the aim of providing greater competitive balance between clubs. It also potentially offers poorer clubs a better chance of financial stability. Revenue sharing does not directly reduce players' wages but it indirectly impacts them, particularly the better players. This is because it restricts the spending ability of wealthy clubs, the income of which is often reduced or restricted due to their revenue sharing obligations. Revenue sharing usually takes one of two forms. First, it can mean splitting a sum equally between the clubs.<sup>222</sup> Clearly, in this situation, the revenue sharing will not affect competitive balance. Each team will receive the same amount of funds so, in theory at least, it will not draw the playing strength of the teams closer together. It is hoped, however, that it will assist financial viability amongst all the clubs but this is dependent on the money being used appropriately. In the second form, where funding is being provided by the larger clubs to the smaller clubs, revenue sharing does have the potential to enhance competitive balance.<sup>223</sup> In this situation the smaller clubs have the opportunity to spend their share on player talent and the larger clubs will have less to spend on improving their player squad.

Sports economists, looking at the effect of revenue sharing on gate receipts, have differing views. Rottenberg, for instance, assessed revenue sharing as having no effect on gate receipts based on the invariance principle which sees the market reaching equilibrium without the assistance of any outside interference.<sup>224</sup> His view has subsequently been endorsed by El-Hodiri and Quirk,<sup>225</sup> Fort and Quirk,<sup>226</sup> Vrooman<sup>227</sup> and Rascher<sup>228</sup> but Szymanski and

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<sup>222</sup> Stefan Szymanski and Stefan Kesenne, 'Competitive Balance and gate Revenue Sharing in Team Sports' (2004) 52(1) *The Journal of Industrial Economics* 165.

<sup>223</sup> Dan Martens, 'Revenue-Sharing in Sport: An Analysis of the Big Three' (Web Page, 6 August 2011) <[www.misis.com](http://www.misis.com)>.

<sup>224</sup> Rottenberg (n 25) 256.

<sup>225</sup> El Hodiri and Quirk (n 51) 1302–1319.

<sup>226</sup> Fort and Quirk (n 52) 1265–1299

<sup>227</sup> John Vrooman, 'A general theory of professional sports leagues' (1995) 61 *Southern Economic Journal* 971–990.

<sup>228</sup> D Rascher, 'A model of a professional sports league' in W Hendricks (ed), *Advances in the economics of sport (vol 2)* (Greenwich, CT: JAI Press 1997) 27–76.

Kesenne found that revenue sharing worsened competitive balance.<sup>229</sup> Marburger, however, suggests that ‘increasing sharing of revenues may enhance competitive balance’.<sup>230</sup> Atkinson, Stanley and Tshirhart,<sup>231</sup> Kesenne<sup>232</sup> and Dietl, Grossmann and Lang<sup>233</sup> have been more positive, finding that sharing of revenues does enhance competitive balance.

Taking a different perspective, Sloane regards ‘revenue sharing’ as an inappropriate description for what he says is really a tax and subsidy situation, in which net revenue is transferred from the large clubs to the small ones.<sup>234</sup> He suggests that ‘the willingness to supply a winning team decreases for the large club and increases for the small club, leading to an improvement in competitive balance’.<sup>235</sup>

Palomino and Rigotti, meanwhile, distinguish between those competitions operating a utility/demand maximisation and those conducting a profit maximisation approach. They maintain that under the former, ‘a performance-based reward scheme which depends on the tournament’s outcome may be optimal’, whereas under the latter, ‘full revenue sharing is always optimal’.<sup>236</sup>

The lack of clarity in the literature suggests it is very difficult to measure the impact of revenue sharing and this is almost certainly ‘intensified by the differences in approach, the different models, and the different methodology’.<sup>237</sup> Furthermore, it may be possible to explain the

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<sup>229</sup> Stefan Szymanski and Stefan Kesenne ‘Competitive Balance and Gate Revenue Sharing in Team Sports’ (2004) 52(1) *The Journal of Industrial Economics* 165–177.

<sup>230</sup> Daniel Marburger, ‘Gate Revenue Sharing and Luxury Taxes in Professional Sports’ (1997) 15 *Contemporary Economic Policy* 114–123.

<sup>231</sup> Scott Atkinson, Linda Stanley and John Tshirhart, ‘Revenue sharing as an incentive in an agency problem: An example from the National Football League’ (1988) 19 *RAND Journal of Economics* 27–43.

<sup>232</sup> Stefan Kesenne, ‘Revenue Sharing and Competitive Balance in Professional Team Sports’ (2000) 1(1) *Journal of Sports Economics* 56–65.

<sup>233</sup> Helmut Dietl, Martin Grossmann and Markus Lang, ‘Competitive Balance and Revenue Sharing in Sports Leagues With Utility-maximising Teams’ (2011) 12(3) *Journal of Sports Economics* 284–308.

<sup>234</sup> Sloane (n 50) 7.

<sup>235</sup> Ibid.

<sup>236</sup> Frederic Palomino and Luca Rigotti, ‘The Sport League’s Dilemma: Competitive Balance versus Incentives to Win’ (Economic Working Papers E00-292 Department of Economics, University of California, Berkeley I November 2000) 3. More recently, economists have introduced the terms ‘dulling’ and ‘sharpening’ to describe the effects of revenue sharing. The dulling effect ‘reduces the incentives for clubs to invest in playing talent because each club has to share some of the resulting marginal benefits of its talent investment with the other clubs in the league’. The ‘sharpening’ effect, on the other hand, occurs where revenue sharing enhances incentives to invest in playing talent. Dietl, Grossmann and Lang conclude that ‘(t)he sharpening effect is present if revenue sharing has a positive effect on marginal revenue, while the dulling effect is present if revenue sharing has a negative effect on marginal revenue’. See Helmut Dietl, Martin Grossmann and Markus Lang, ‘Competitive Balance and Revenue Sharing in Sports Leagues With Utility-maximising Teams’ (2011) 12(3) *Journal of Sports Economics* 284–308.

<sup>237</sup> Kesenne (n 232) 57.

variety of potential outcomes by remembering that club responses to revenue sharing can be quite different. Sports economists are looking to apply consistent theoretical analysis to the topic but, in reality, clubs will not all respond in the same way to the same set of circumstances.

The advantage of revenue sharing in sport is based on the large difference which often exists between the clubs in a competition where some are wealthy and receive a sizeable income and others are poor drawing a meagre income.<sup>238</sup> This disparity in wealth and revenue means that richer teams can afford better players and are consequently more successful.<sup>239</sup> Revenue sharing provides a mechanism to redistribute income from the wealthier teams to the less wealthy teams with the aim of making the competition more balanced and more appealing to supporters of the sport.<sup>240</sup> Palomino and Rigotti argue that the demand for the sport rises and leads to an increase in competition revenue.<sup>241</sup> They also argue that ‘[i]f teams are profit maximisers, revenue sharing also decreases the price teams pay for top players since their marginal value decreases’.<sup>242</sup> This enables clubs to increase their profits too.<sup>243</sup>

The disadvantage of revenue sharing is that it could lead to a destabilising of the competition with owners of wealthy clubs reducing their spending on players to maintain profits at the level they were before revenue sharing was introduced. If some clubs were to take this approach then revenue sharing could have a negative impact on demand and team profits on the basis that the lack of incentives for owners will filter through to the players and then to the supporters, which could lead to poorer team performances and, thus, ultimately affect spectator support. Similarly, unless there is a minimum spending cap on players, there is a real possibility that the club benefitting from the revenue sharing will not spend the money received on improving their player talent but may prefer to use the payment to simply improve their financial situation.<sup>244</sup> If either of these scenarios were to arise, damage to the competition could occur.

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<sup>238</sup> Palomino and Rigotti (n 236) 3.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Dan Martens (n 223) 2. An example of this is the MLB side, Pittsburgh Pirates, whose record (135–189) in the 2007 and 2008 seasons was one of the league’s worst. However, by not spending the sum of \$69.3 million in shared revenue, the club was able to turn a \$40 million loss into a \$29.3 million profit.

The importance of revenue sharing in sport has grown substantially in recent times because of two factors. First, sport is attracting much larger revenues as the huge public interest generated by sport has prompted media broadcasting businesses to enter into lucrative deals with sporting bodies. Second, these deals are generally negotiated with the sporting body rather than individual clubs which makes the negotiations easier to finalise and implement with fewer parties and agreements involved. There is also a generally held view that clubs negotiating as a collective body can secure a better overall deal than clubs negotiating individually.<sup>245</sup>

However, the collective negotiation requires a division of the revenue received and it appears that this division, depending on the facts of each particular case, can extend the focus beyond competitive balance and financial viability to include what is in the best interests of the sport and its development. For example, Cricket Australia (CA) wanted to change the percentage shares provided to its different cricketing groups as it considered that it was currently too favourable to the male players and did not allow it the opportunity to put greater funds into women's and grassroots cricket.<sup>246</sup> Eventually, it was agreed that players would 'share up to 30 per cent of agreed revenue, which is made up of 27.5 per cent of forecast revenue streams and a 2.5 per cent performance pool'.<sup>247</sup> As a result the sum available for women player payments over the next five years will increase from \$47.5 million to \$55.2 million and grassroots cricket will receive a \$25 million funding boost over the same period.<sup>248</sup>

Revenue sharing can be used to reach a number of potential outcomes depending on the circumstances and the parties involved in the negotiation, and each sport or sporting group needs to formulate a revenue sharing model to deal with its specific circumstances. The NFL's revenue sharing model comprises dividing broadcasting revenue equally between the teams and splitting ticket revenue with the home side retaining 60% and the visiting team receiving 40%.<sup>249</sup> Other sources of revenue are not initially split but a luxury tax is employed to cover

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<sup>245</sup> Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press, 2003) 185. At the first European Union Conference on Sport (May 1999), 'most of the participants (*of the working group*) expressed the view that the collective sale of sports rights by federations was the best system for ensuring effective redistribution and maintaining the solidarity of sport'.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.* The new agreement provides a male international cricketer's base salary to increase from \$270,000 to \$278,100 in year one and rise by 15.9 per cent in the last year of the agreement in 2021–22 to \$313,004.

<sup>248</sup> *Ibid.*

<sup>249</sup> Charlie Zegers, 'Revenue Sharing and North America's Major Pro Sports Leagues', *Liveabout dotcom* (Web Page, 24 March 2017) <<https://www.liveabout.com/basketball-4688111>>.

these other sources of revenue, which does allow the poorer sides to benefit.<sup>250</sup> This model seems to work successfully for the NFL, but it is unlikely to work in the case of the NBA ‘where the bulk of each team’s revenue comes from local sources – ticket sales, local and regional television contracts and the like’.<sup>251</sup>

### 3.3.4 *Luxury Tax*

A luxury tax was first used in the MLB in the mid-1990s. It arose very much as a compromise. The owners wanted a ‘hard’ salary cap but the players’ association was not prepared to agree as it was seen as a deliberate move to control the wages of its members.<sup>252</sup> The dispute was resolved with the introduction of the luxury tax, which ‘is a penalty imposed on teams that spend above a collectively bargained level’.<sup>253</sup> The luxury tax was seen as an acceptable device by both owners and players. To owners the tax was viewed as a quasi or ‘soft’ salary cap which might reduce spending. From the players’ perspective it appeared advantageous as it did not possess the restrictive element of a ‘hard’ salary cap, providing ‘the promise of unlimited salary growth’.<sup>254</sup> Furthermore, from a competitive balance standpoint, there was the opportunity to penalise the high-spending teams and redistribute the monies collected to the poorer teams.<sup>255</sup>

Commentators have tended to support the luxury tax with Marburger noting that a tax coupled with an even distribution of the proceeds between the clubs may be an ‘appealing’ way to assist teams in smaller markets.<sup>256</sup> Ajilore and Hendrickson found in their study on whether the luxury tax had a tangible impact on competitive balance in the MLB that ‘there had been the intended effect on these teams’ spending though the results were being driven by the New York Yankees’.<sup>257</sup> Dietl, Lang and Werner concluded that, under the assumption that clubs are looking to maximise profits, ‘both competitive balance and total salary will increase’ and ‘the effect of luxury taxes on social welfare is positive, because league quality will always

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<sup>250</sup> Ibid.

<sup>251</sup> Ibid 3.

<sup>252</sup> Dayn Perry, ‘No, baseball (still) doesn’t need a salary cap’, *CBS Sports* (Web Page, 5 December 2013) <<https://www.cbssports.com/mlb/news/no-baseball-still-doesnt-need-a-salary-cap/>>.

<sup>253</sup> Richard Kaplan, ‘The NBA Luxury Tax Model: A Misguided Regulatory Regime’ (2004) 104(6) *Columbia Law Review* 1615, 1617.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Marburger (n 230) 122.

<sup>257</sup> Olugbenga Ajilore and Joshua Hendrickson, ‘The Impact of the Luxury Tax on Competitive Balance in Major League Baseball’ (Working Paper Series, Paper No. 07-27 North American Association of Sports Economists May 2005 Revised: March 2007) 12. The New York Yankees is the wealthiest club in the MLB and was the main subscriber to the luxury tax for many years. This means that any research material into the luxury tax in the MLB is going to heavily relate and refer to information pertaining to the New York Yankees.

increase as a result of the combination of luxury taxes and its resulting subsidies'.<sup>258</sup> Despite their positive view, the luxury tax is not used as frequently as the salary cap in sporting competitions to control salaries and provide competitive balance. However, it is still used in the MLB and also, in conjunction with a salary cap and draft system, in the NBA.

When first introduced in the MLB in 1997, the luxury tax operated on an adjustable threshold so that only a maximum of five teams could exceed the threshold in any one season.<sup>259</sup> The tax did not appear to have a huge impact with the largest tax imposed being the conservative amount of \$3.1 million imposed on the Baltimore Orioles which had spent nearly \$25 million over the threshold of \$55 million.<sup>260</sup> The adjustable threshold was changed in 2002 to a flat figure and the tax rate was reduced to 17.5%.<sup>261</sup> In 2004, different tax rates were introduced to provide for larger penalties for repeat offenders.<sup>262</sup> However, it seems that the threshold was set too high, with only three teams spending within 10% of it.<sup>263</sup> This problem persisted until a new agreement was introduced in 2017 to cover the period until 2021. The basic tax rate was increased from 17.5% to 20%.<sup>264</sup> Repeat offender rates were increased from 20% to 30% in year two and to 50% in year three.<sup>265</sup> A surcharge tax of 12% was introduced where the threshold was exceeded by \$20 million to \$40 million and excesses above \$40 million were taxed at 42.5% for the first time and at 45% for subsequent years.<sup>266</sup> Further, from 2018, clubs that spent \$40 million or more above the threshold had their highest selection in the next draft moved back 10 places unless the pick fell in the top six. If that happened the team would have its second-highest selection moved back ten places in lieu.<sup>267</sup>

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<sup>258</sup> Helmut Dietl, Markus Lang, and Stephen Werner, 'The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues' (Working paper Series, Paper No. 08/23 National American Association of Sports Economists August 2008) 14.

<sup>259</sup> Kaplan (n 253) 1629. The threshold figures were \$51 million in 1997, \$55 million in 1998 and \$58.9 million in 1999. The taxation rate was fixed at 35% for 1997 and 1998 and at 34% for 1999.

<sup>260</sup> Ibid.

<sup>261</sup> Kaplan was very critical of the 2002 version of the tax referring to its 'utter ineffectiveness', pointing out that in 2003 only one team, the New York Yankees, went over the threshold and had to pay tax.

<sup>262</sup> Ibid 1630.

<sup>263</sup> Ibid 1631.

<sup>264</sup> Mike Axisa, 'Making a case for the Yankees to exceed the \$197M luxury tax threshold in 2018', *River Ave Blues* (18 January 2018) <<http://riveraveblues.com/2018/01/yankees-luxury-tax-yu-darvish-197-million-165175/>>. See also 'MLB Glossary: Competitive Balance Tax', *MLB.com* (Web Page, viewed 9 April 2018) <[www.mlb.com](http://www.mlb.com)> and Mike Margy, 'Dodgers: Understanding the MLB Luxury Tax System', *Dodgers Way* (Web Page, viewed 9 April 2018) <<https://dodgersway.com/2017/12/26/dodgers-the-competitive-balance-tax-huh/>>.

<sup>265</sup> Ibid.

<sup>266</sup> 'MLB Glossary: Competitive Balance Tax', *MLB.com* (Web Page, viewed 9 April 2018) <[www.mlb.com](http://www.mlb.com)>.

<sup>267</sup> Ibid.

The new stringent penalties seemed to have an effect on the two wealthiest clubs in the competition, the New York Yankees and the Los Angeles Dodgers. Both clubs indicated their intent to fall within the threshold limit for the 2018 season, and they subsequently achieved that aim.<sup>268</sup> The harsher rules considerably reduced the total luxury tax payments for 2018 and 2019 with payments of \$14.34 million<sup>269</sup> and \$27.7 million,<sup>270</sup> respectively, being required. This was considerably less than the totals for the three previous years which were \$72.8 million for 2015, \$74 million for 2016 and \$61.15 for 2017.<sup>271</sup> It certainly appeared as if clubs were beginning to consider whether exceeding the luxury tax threshold and paying the penalties was a sound approach.

Although the luxury tax in the MLB has been criticised,<sup>272</sup> its results do not necessarily support that criticism. It was introduced to provide competitive balance and curb club overspending on player salaries to protect the financial viability of the clubs in the competition.<sup>273</sup> From a competitive balance perspective there have been eight different winners of the MLB competition in the last ten years. This rate of 80% compares favourably with approximately 57% for the period from 1980 to the present.<sup>274</sup> In the other area of maintaining wage control, the MLB's spending from net revenue was 'between 48.5% and

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<sup>268</sup> Axisa (n 264) 2. Note: the luxury tax rules provide for the penalty calculation to restart if a club meets the threshold in the previous season. This means a club would only be taxed at the rate of 20% for any overspending in the first season after meeting the threshold, rather than 50% (the rate for third year offenders). Further, the additional surtax for excessive overspending may also apply. See also Mike Axisa, 'The MLBPA has a big problem to address as Dodgers, Yankees, Marlins dump salary', *CBS Sports* (Web Page, 16 December 2017) <<https://www.cbssports.com/mlb/news/the-mlbpa-has-a-big-problem-to-address-as-dodgers-yankees-marlins-dump-salary/>>. See also Associated Press, 'Dodgers, Yanks must pay up before expected 2018 payroll slashing', *ABC7 Los Angeles* (Web Page, 20 December 2017) <<https://abc7.com/sports/dodgers-yanks-must-pay-up-before-expected-2018-payroll-slashing/2800106/>> and Tom Gatto, Dodgers, 'Yankees get MLB luxury tax bills; reset in '18 goal for both teams', *Sporting News* (19 December 2017) <<https://www.sportingnews.com/us/mlb/news/mlb-luxury-tax-dodgers-yankees-giants-tigers-nationals-paying-2019-fa-class-cba-harper-machado/of13a6nhs1qk17v17iqubxjrz/>>.

<sup>269</sup> Mike Axisa, 'Only Red Sox, Nationals owe luxury tax in 2018 as MLB teams combine for smallest bill in 15 years', *CBS Sports* (Web Page, 15 December 2018) <<https://www.cbssports.com/mlb/news/only-red-sox-nationals-owe-luxury-tax-in-2018-as-mlb-teams-combine-for-smallest-bill-in-15-years/>>.

<sup>270</sup> Ronald Blum, 'APNewsBreak: Red Sox, Yanks, Cubs sent 2019 luxury tax bills', *AP News* (Web Page, 19 December 2019) <<https://apnews.com/article/1c06039c90703db8c5e9ccef59ab08d3>>.

<sup>271</sup> Ibid.

<sup>272</sup> Chris Cwik, 'The luxury tax is bad for MLB, and is already destroying the game', *Yahoo Sports* (Web Page, 6 January 2018) <<https://sports.yahoo.com/luxury-tax-bad-mlb-actively-destroying-game-201649772.html>>. Cwik argues that the increases in the luxury tax penalties will not contribute to competitive balance but merely result in lower salaries for the top players. See also Richard Kaplan, 'The NBA Luxury Tax Model: A Misguided Regulatory Regime (2004) 104(6) *Columbia Law Review* 1615, 1630 and above at note 14. For a contrary view, see Jim McLennan, 'No, the luxury tax is not "destroying the game"', *AZ Snake Pit* (Web Page, 9 January 2018) <<https://www.azsnakepit.com/2018/1/9/16866454/mlb-luxury-tax-baseball-free-agents>>.

<sup>273</sup> It must also be acknowledged that club owners want to curb salary payments so as to increase their profits.

<sup>274</sup> There have been 14 different winners from 23 since 1997 (approximately 61%) and 22 different winners from 39 since 1980 (approximately 56%).

51.7% on wages each year since 2006.<sup>275</sup> This percentage of spending on player salaries is actually less than that of other major sports in the US.<sup>276</sup>

The NBA also has a luxury tax but it is used in conjunction with a salary cap. It was introduced in the 2000–2001 season due to the limited effectiveness of the ‘soft’ salary cap<sup>277</sup> which had been instituted in 1984 to put a ceiling on team payrolls.<sup>278</sup> The NBA had proposed a ‘hard’ cap but the NBA Players Association argued that this would cause players to be underpaid. In the circumstances, the NBA relented and, by allowing a number of exceptions to apply, it ultimately became a ‘soft’ cap. That ‘soft’ salary cap did not assist competitive balance and hence the luxury tax was subsequently introduced.<sup>279</sup>

The system operates on the basis that the salary cap acts as a limit for spending on players who are outside free agents, but teams are allowed to go over the cap to retain their own players, subject to some restrictions.<sup>280</sup> One restriction is that a team has to pay a luxury tax if it goes over a threshold, usually set at \$20 million over the salary cap for the season.<sup>281</sup> Further, there is also a ‘repeater status’ category which penalises those clubs at a higher tax rate, if they have paid the luxury tax in three of the four previous seasons.<sup>282</sup>

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<sup>275</sup> Associated Press, ‘AP study: players’ share of Major League Baseball revenues remain stable over past decade’, *The Chronicle* (online at 21 March 2016) <<http://www.chroniclet.com/national-news/2016/03/21/AP-study-players-share-of-Major-League-Baseball-revenues-remain-stable-over-past-decade.html>>.

<sup>276</sup> FansEdge, ‘Pro Sport Salary Structures’ (Web Page, viewed 10 April 2018) <<https://visual.ly/community/Infographics/sports/pro-sport-salary-structures-nfl-mlb-nba-and-nhl>>. The figures for the other sports are 59.5% (NFL), 57% (NBA) and 54–57% (NHL).

<sup>277</sup> John Gobok, ‘The NBA soft cap and luxury tax’ (30 April 2011) *Harvard Undergraduate Research Journal* <[www.thurj.org](http://www.thurj.org)> 5.

<sup>278</sup> Ibid 4.

<sup>279</sup> Ibid.

<sup>280</sup> Dom Flaim, ‘Mo Money, Mo Problems: The Thunder’s financial future and salary cap breakdown’, *Welcome to Loud City* (Web Page, 9 October 2017) <[www.welcometoloudcity.com](http://www.welcometoloudcity.com)>.

<sup>281</sup> Ibid. The salary cap for 2017–18 is \$99 million with the luxury tax threshold set at \$119 million. See Dave Deckard, ‘2017–18 NBA Salary Cap Figures Released’, *Blazers Edge* (Web Page, 30 June 2017) <<https://www.blazersedge.com/2017/6/30/15907414/2017-18-nba-salary-cap-luxury-tax-mid-level-exception-numbers-trail-blazers>>. The basic tax rate is \$1.50 for \$0 to \$4,999,999 million, \$1.75 for \$5 million to \$9,999,999 million, \$2.50 for \$10 million to \$14,999,999 million, and \$3.25 for \$15 million to \$19,999,999 million. The rate increases by 50 cents for each additional \$5 million. See Steven Loung, ‘NBA off-season FAQ: Explaining “Bird rights,” luxury tax, more’, *Sports Net* (Web Page, 30 June 2017) <<https://www.sportsnet.ca/basketball/nba/nba-off-season-faq-explaining-bird-rights-luxury-tax/>>.

<sup>282</sup> Steven Loung, ‘NBA off-season FAQ: Explaining “Bird rights,” luxury tax, more’, *Sports Net* (Web Page, 30 June 2017) <<https://www.sportsnet.ca/basketball/nba/nba-off-season-faq-explaining-bird-rights-luxury-tax/>>. The repeater tax rate is \$2.50 for \$0 to \$4,999,999 million, \$2.75 for \$5 million to \$9,999,999 million, \$3.50 for \$10 million to \$14,999,999 million, and \$4.25 for \$15 million to \$19,999,999 million. At \$20 million plus the rate is \$4.75, increasing by 50 cents for each additional \$5 million. Importantly, from a competitive balance perspective, teams must spend a minimum amount of 90% of the salary cap. If a team does not achieve this level, it is surcharged for its shortfall with the surcharge being distributed among the players on that team. See Larry Coon, ‘NBA Salary Cap FAQ’, *CBA Mastery* (Web Page, 30 June 2017) <<http://www.cbafaq.com/salarycap.htm>>. How the money is distributed is up to the players’ union. Most



The use of the luxury tax in the NBA has been criticised. Menon maintains that ‘today’s byzantine cap model, which includes two thresholds, countless exceptions, variable fines, vague uses of tax revenue and a history of initial but ultimately short-lived effectiveness, is not the answer’.<sup>283</sup> He suggests that the luxury tax penalties are insufficiently high to offset the possibility of potential gains from overspending and that owners are prepared to pay the tax on the basis that if their team makes the playoffs there will be additional playoff revenue received and the prospect of increased ticket sales and prices the following year, which they can use to meet the luxury tax payment.<sup>284</sup>

Menon’s points can be supported to some extent. The recent accomplishments of the Cleveland Cavaliers and Golden State Warriors provide examples of teams which have spent approximately \$112 million and \$99 million to achieve their championship wins between 2015 and 2018.<sup>285</sup> However, prior to their championship wins, the Brooklyn Nets and the New York Knicks incurred luxury tax costs of \$120 million and \$53 million, respectively, between 2012 and 2015 but had only minimal success on the court.<sup>286</sup>

The evidence does suggest that through monitoring financial viability by controlling player salary costs and encouraging competitive balance, as evidenced by the number of different winners of its annual competition, some favourable results are being produced. Wage control

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recently it has been distributed to players who had spent 41 games on the team’s roster, with a half share being given to players who had spent 20 to 40 games on the roster.

<sup>283</sup> Prashob Menon, ‘Pay to Play: Why It’s Time to End the NBA’s Luxury Tax’, *REDEF* (Web Page, 30 March 2016) <[www.redef.com](http://www.redef.com)>. 23. See also John Gobok, ‘The NBA soft cap and luxury tax’ (30 April 2011) *Harvard Undergraduate Research Journal* <[www.thurj.org](http://www.thurj.org)>. Note that the NBA now has higher penalty rates for repeat offenders.

<sup>284</sup> *Ibid* 15–19. Note that the MLB has increased the penalties since the publication of Menon’s article. Menon also notes that over the past 14 years franchise equity has skyrocketed with ‘the value of the average team having grown ‘an astonishing 8.3% per year (or roughly threefold overall), with median annual gains of nearly \$43m’. With these equity increases in team value an owner is not going to be over-concerned with paying the luxury tax. The tax would simply be seen as an expense incurred to grow the business. See Prashob Menon, ‘Pay to Play: Why It’s Time to End the NBA’s Luxury Tax’, *Ivey Business Review* (30 March 2016) <<http://iveybusinessreview.ca/blogs/pmenonhba2010/2016/04/14/pay-play-time-end-nbas-luxury-tax/>> 21.

<sup>285</sup> ‘NBA luxury tax payments by team from 2012/13 to 2015/16 (in million US dollars)’, *Statista* (Web Page, Viewed 11 April 2018) <<https://www.statista.com/statistics/262004/nba-teams-by-luxury-tax-payments/>>. The Cavaliers paid over \$60 million in luxury tax in the 2014–15 and 2015–16 seasons and further amounts of \$24.8 million and \$27 million for the 2016/17 and 2017/18 season. The departure of Le Bron James to the Los Angeles Lakers in 2018 meant that the Cleveland Cavaliers did not have to pay luxury tax for the 2018/19 season. The Golden State Warriors incurred a luxury tax of \$14.8 million in 2015–16 but were able to keep under the threshold in 2016–17. However, tax payments of \$32.3 million and \$51.5 million were required for the 2017–18 and 2018–19 seasons, respectively. See Joe Vardon, ‘Le Bron James leaves Cleveland again, agrees to join Los Angeles Lakers’, *Cleveland.com* (Web Page, 2 July 2018) <[https://www.cleveland.com/cavs/2018/07/lebron\\_james\\_leaves\\_cleveland.html](https://www.cleveland.com/cavs/2018/07/lebron_james_leaves_cleveland.html)>. See also Brian Windhorst, ‘The Cavaliers’ payroll could be the most expensive ever’, *ESPN* (Web Page, 18 February 2018) <[https://www.espn.com.au/nba/story/\\_/id/22420673/cavaliers-face-300-million-dollar-future-espn](https://www.espn.com.au/nba/story/_/id/22420673/cavaliers-face-300-million-dollar-future-espn)>.

<sup>286</sup> *Ibid* 1.

has been assisted greatly by the vast amounts of money coming from broadcasting rights with a greater pool available for division between the players and the teams. The 2017 Collective Bargaining Agreement requires the players to receive between 49% and 51% of basketball related income.<sup>287</sup> Historically, the NBA average has been at about 57%.<sup>288</sup> The percentage of different winners also seems to be improving with seven different winners in the 10 years between 2011 and 2020 (70%). This is an increase in comparison to the period from 1980 to 2020, which produced 11 different winners out of 41 (26.8%). It would be inappropriate to suggest the luxury tax is fully responsible for the improvement, but the results suggest it has not had a negative impact.

Although the NBA arrangement is different to the MLB in that it uses the luxury tax together with a salary cap, the progress of the NBA and the MLB is in many ways similar. Grappling with the introduction of the luxury tax has been a learning experience for both sports as they seek the right threshold point and levels of penalty to use.<sup>289</sup> If the right threshold and appropriate penalty rates are achieved, there is potential for the luxury tax to provide some competitive balance to a competition. However, confirmation will not occur until the MLB and the NBA complete a further monitoring period over the next five seasons to see if their newly fixed threshold levels and penalty rates have a positive effect on competitive balance within their respective competitions.

### 3.4 Conclusion

The majority of player movement restraints are no longer tenable. The concept of zoning has been held to be illegal and, in any event, only provides a basic process of assigning players from particular areas to clubs. With no attempt to grade the players' abilities, its chances of

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<sup>287</sup> Brian Windhorst, 'Salary-cap projection for 2017–18 season to be lower than expected', *ESPN* (Web Page, 8 July 2016) <[https://www.espn.com.au/nba/story/\\_/id/16859143/nba-salary-cap-projection-2017-18-season-lower-expected](https://www.espn.com.au/nba/story/_/id/16859143/nba-salary-cap-projection-2017-18-season-lower-expected)>.

<sup>288</sup> Fansedge (n 276) 2.

<sup>289</sup> There was a player strike in the MBL in 1994–95 and there were lockouts in the NBA in 1998–99 and in 2011. See Ryan Fagan, 'Baseball strikes and lockouts: A history of MLB work stoppages', *Sporting News* (Web Page, 5 February 2018) <<https://www.sportingnews.com/us/mlb/news/mlb-free-agents-labor-dispute-history-1994-1981-strike-1990-lockout-marvin-miller-mlbpa/lhl6crvxn0ya1xrc5n9m915xf>> and CNN Library, 'Pro Sports Lockouts and Strikes Fast Facts', *CNN* (Web Page, 26 May 2017) <<https://edition.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html>>. The repeater tax was introduced in the NBA in 2014 and the surtax in the MBL in 2017. See Mark Deeks, 'The repeater tax is going to transform the NBA', *SBNation* (Web Page, 21 November 2013) <<https://www.sbnation.com/2013/11/21/5126774/nba-luxury-tax-2013-repeater-chicago-bulls>> and David Schoenfield, 'Could teams actually pay a 92 percent luxury tax under the new CBA? Yes—and no.', *ESPN* (Web Page, 3 December 2016) <[https://www.espn.com/blog/sweetspot/post/\\_/id/76736/how-luxury-tax-penalties-would-work-on-baseballs-biggest-payrolls](https://www.espn.com/blog/sweetspot/post/_/id/76736/how-luxury-tax-penalties-would-work-on-baseballs-biggest-payrolls)>.

successfully assisting competitive balance would rely solely on luck and not judgement. The retain and transfer rule and the reserve clause, which operate under the same principle of seeking to control a player's movement once his or her contract has expired, would also no longer be tenable on legal grounds as was made clear in the *Bosman* case. The quota system has the potential to obtain legal sanction, as it did in the NZR example, but it is unlikely to have the robustness required in assessing player talent to have a major impact on the competitive balance of a competition. The draft system does consider the talent of players in more detail than the quota system but that alone may not be sufficient to necessarily secure a favourable competitive balance outcome. It is worth noting that the success of the draft system occurs when it is used in conjunction with financial restraints like the salary cap and revenue sharing, as happens in the NFL and AFL.

With regard to financial restraints it seems clear that the maximum wage has limited application in current times, although it might be used in a newly formed competition. The salary cap can impose an equal spending by clubs on players, which will assist with both financial stability and competitive balance but that, by itself, will not produce the most favourable results in these areas. Although the salary cap does restrict the major expense of wages it does not affect other club expenses nor does it take into account a club's revenue. Both of these aspects affect financial stability and competitive balance, with the more gifted players being attracted to clubs with better facilities and resources.

The same argument that applies to salary caps also covers revenue sharing which only focusses on a club's income. If revenue sharing covered all income clubs received it would provide some financial stability and competitive balance but this would be difficult to orchestrate and manage in most instances. Consequently, it appears that a combination of the salary cap and revenue sharing is likely to produce better financial stability and competitive balance than the use of one of the restraints alone. A draft system could also be used to improve those results, a view is supported by the success the NFL and AFL have in competitions where they combine all three measures.

The luxury tax as a means of financial restraint also has merit, but for different reasons. It is not as rigorous in how it operates as the other financial measures though, if the level of tax and the penalty rates are set correctly, it has the capacity to work reasonably successfully, as the MLB results are beginning to demonstrate. However, the key benefit of the luxury tax is the choice it gives clubs. Its flexibility gives it an extra dimension which the salary cap does

not possess and that can make the restraint more acceptable to competitions where there are clubs with a considerable disparity in their financial positions.

Overall, although the draft system is the 'player movement' restraint that appears most effective in achieving financial stability and competitive balance, each of the financial restraints also have merits. Therefore, an 'ideal' solution to the two issues facing competitive team sports may involve choosing the most acceptable one (or a combination of them) to fit the circumstances and requirements of the competition being assessed.

In Chapters 2 and 3 the general principles relating to the governance of professional team sports including aspects of labour market control, which include player movement and financial restraints, have been examined. The importance of examining these in this thesis is that they provide potential alternatives to the FFP Regulations. They also highlight that financial restraints in sport existed before the FFP Regulations came into place. The following chapters move from a general position to the particular situation of European football and, especially, the body that runs European football, UEFA.

## CHAPTER 4: UNION OF EUROPEAN FOOTBALL ASSOCIATIONS (UEFA)

### 4.1 Introduction

This chapter reviews the organisation known as UEFA. It examines its history and role, its organisational arrangements, its values and its relationship with stakeholders to obtain a better understanding of its thinking as the leader of European football and its reasons for introducing the FFP Regulations. Its aims and motivations are central to the consideration of the legitimacy and necessity of the FFP Regulations.

### 4.2 Brief History of UEFA

After the Second World War, a number of Europe's national football associations wanted to play international games in addition to the Federation Internationale de Football Association (FIFA) World Cup and friendly internationals.<sup>290</sup> There was also a desire 'to bring Europe's national associations together into one body, fostering solidarity and strengthening them as a result'.<sup>291</sup> The South American associations had already formed their own confederation in 1916, which allowed them to prepare together for FIFA meetings and produce a united front.<sup>292</sup> The European associations, which tended to promote their individual views at the expense of a common approach, were beginning to appreciate the need for unity within FIFA, as the latter continued to expand in size with its one vote per association rule meaning that the European vote and consequential influence was being diluted.<sup>293</sup>

It was generally recognised 'in the early 1950s that continental authorities, rather than just one central worldwide body, were needed to supervise and direct football's constant growth'.<sup>294</sup> In 1953, a FIFA congress in Paris authorised the creation of continental confederations.<sup>295</sup> This was the catalyst for the formation of a European confederation, which became known as the 'Union of the European Football Associations in English, with the initials UEFA, and Union des Associations Européennes de Football in French'.<sup>296</sup> UEFA's

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<sup>290</sup> Mark Chaplin, 'The Birth of UEFA', *UEFA.com* (Web Page, 5 May 2014) <[www.uefa.com](http://www.uefa.com)>.

<sup>291</sup> *Ibid.*

<sup>292</sup> Vieli (n 7) 12.

<sup>293</sup> *Ibid.*

<sup>294</sup> UEFA, 'UEFA history – Early days and constant expansion', *UEFA.com* (Web Page, 2017) <[www.uefa.com](http://www.uefa.com)> 1.

<sup>295</sup> Chaplin (n 290) 1.

<sup>296</sup> *Ibid.*

inaugural conference was held in Vienna on 2 March 1955 and it was there that UEFA's first official statutes were adopted and came into force.<sup>297</sup>

The three main concerns of the fledgling organisation were the commencement of European football competitions, the definition of its role as the main body in charge of European football and its relationship with FIFA.

The establishment of UEFA's own European-based competitions began with the European Champion Clubs' Cup in 1955. It was a little surprising and paradoxical that a 'club' competition was the first cup event introduced, as the national associations 'were more interested in a competition for national teams than in one for clubs over which they did not always hold much sway in their respective countries'.<sup>298</sup> The success of the cup was immediate which was perhaps not surprising bearing in mind 'the frustration of the war years' and 'the advances in air travel'.<sup>299</sup> Europe had also shown interest in established international competitions.<sup>300</sup> Over the years the competition has gone from strength to strength despite undergoing a name change to the UEFA Champions League (UCL) from the 1992–93 season and some tournament changes, including the introduction of a group phase in 1991 and multiple national representatives in 1998.

The European Nations Cup finally commenced in 1960. Despite Article 4(e) of UEFA's initial statutes identifying the aim of introducing a European Championship Series for its member countries to be held every four years,<sup>301</sup> initial proposals involved dividing 'the competition into two phases, with a knockout stage the season before the World Cup and a final tournament in a single country the following season'.<sup>302</sup> This caused major concern to FIFA officials who were keen to maintain the integrity and independence of the World Cup and it was only when the clashes with the World Cup were overcome that the competition finally commenced.<sup>303</sup> The competition was popular with the 29 matches averaging a crowd size of

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<sup>297</sup> Ibid.

<sup>298</sup> Vieli (n 7) 25. The club competition started so quickly due to the support of journalists working for the French sports newspaper *L'Equipe* and the unequivocal support of FIFA which was content for UEFA 'to organize the competition, on condition that the national associations concerned gave their consent and it did not contain the word "Europe" in its name'. See Mark Chaplin, 'The Birth of UEFA', *UEFA.com* (Web Page, 5 May 2014) <[www.uefa.com](http://www.uefa.com)> 27.

<sup>299</sup> Ibid 29.

<sup>300</sup> Ibid. The Mitropa Cup was played between clubs in central Europe between 1927 and 1937 and relaunched in the mid-1950s. The Latin Cup, played between Spain, France, Italy, and Portugal, began in 1948 but was discontinued in 1957 as a result of the success of the Champion Clubs' Cup.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid 20.

<sup>303</sup> The competition was held in the same year as the World Cup but after the World Cup had finished.

37,101 per game<sup>304</sup> and its popularity has continued to the present day under its present title of the UEFA European Championship (EURO) which is now held every four years in the gap between World Cups, thus providing European football supporters with a major international competition every two years.

Other major competitions run by UEFA include the European Cup Winners' Cup. It replaced the Mitropa Cup and was set up in 1960–61 as the tournament for domestic cup winners.<sup>305</sup> It was renamed the UEFA Cup Winners' Cup before the 1994–95 season.<sup>306</sup> The competition continued until 1999 when it merged into the UEFA Cup which became known as the UEFA Europa League (UEL1) from the 2009–10 season.<sup>307</sup> In addition, the International Youth Tournament originally commenced by FIFA in 1948<sup>308</sup> was taken over by UEFA in 1956<sup>309</sup> and continues under the amended title of the UEFA European Under-19 Championship.

The role of UEFA as the leader of European football was also of major importance with the European voice within FIFA declining, as by 1954, FIFA comprised 85 national associations of which only 31 were European.<sup>310</sup> The adoption of a common stance vis-à-vis FIFA was a key objective which UEFA needed to address.<sup>311</sup> An important event that assisted UEFA to do this was FIFA's London Congress in 1961 when FIFA officially recognised the role of Continental Confederations and clearly defined their responsibilities. This meant that UEFA's decisions at a general assembly and Executive Committee level, which previously had only been recommendations, became binding on its national association members. UEFA's Statutes were overhauled to confirm this new status and UEFA's stronger and more robust position was revealed by the increase in the number of Articles contained within its Statutes.

UEFA's relationship with FIFA is characterised by a twofold link which exists by virtue of the European national associations being directly affiliated to both FIFA and UEFA. The position was that the members of UEFA's Executive Committee had been elected by the UEFA Congress from 1954 onwards<sup>312</sup> and, in an effort to preserve its independence, UEFA's

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<sup>304</sup> Vieli (n 7) 23.

<sup>305</sup> Ibid 40.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid 46.

<sup>308</sup> Ibid 30.

<sup>309</sup> UEFA, 'From International Youth Tournament to U19 EURO', *UEFA.com* (Web Page, 2018) <<https://www.uefa.com/under19/history/>>.

<sup>310</sup> Vieli (n 7) 9.

<sup>311</sup> Chaplin (n 290) 1.

<sup>312</sup> Ibid 16. However, it should be noted that the FIFA Statutes made exceptions for the British and Soviet associations which could each elect a representative of their own to the position of FIFA vice-president.

Lisbon Congress in 1956 resolved that members of its Executive Committee could not also be members of the FIFA Executive Committee.<sup>313</sup> However, it was soon discovered that European members of the FIFA Executive Committee did not necessarily defend and support positions adopted by UEFA. In an attempt to improve relations between the two organisations, a FIFA–UEFA Executive Committee was formed in 1960 and the UEFA Executive Committee organised special meetings with European members on the FIFA Executive Committee with a view to finding a common approach to outstanding issues.<sup>314</sup> In 1993, UEFA resolved to let UEFA Executive Committee members be elected to the FIFA Executive Committee as well and, from the mid-1990s, FIFA Executive Committee members who are not UEFA Executive Committee members have been invited to attend UEFA Executive Committee meetings.<sup>315</sup>

UEFA’s administrative body expanded during the late 1950s and early 1960.<sup>316</sup> Initially, UEFA’s Executive Committee was its sole decision-making body, ‘but additional expert committees were gradually introduced to deal with the various aspects of the game, and UEFA’s range of activities continued to grow’.<sup>317</sup> The 1970s saw UEFA tighten its administrative grip on its competitions and from 1972 there was only one organising committee for the three UEFA competitions.<sup>318</sup> At the same time, the regulations for each of the competitions were standardised.<sup>319</sup>

In terms of its administration of justice, UEFA adopted the legal principle of the separation of powers at its 1973 Rome Congress, creating a judiciary that was unequivocally independent of the legislature (Congress) and the executive (Executive Committee).<sup>320</sup> From that point onward no members of the Organs for the Administration of Justice were allowed to serve on the Executive or any other UEFA committee.<sup>321</sup> Further, the president and Executive Committee had no influence on disciplinary decisions and could only appoint members to the

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<sup>313</sup> Ibid 17.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> UEFA (n 294) 1.

<sup>317</sup> Ibid.

<sup>318</sup> Vieli (n 7) 49. The three competitions were the European Champion Clubs’ Cup, the European Cup Winners’ Cup and the UEFA Cup (formerly the Inter-Cities’ Fairs Cup).

<sup>319</sup> Ibid.

<sup>320</sup> Ibid 61.

<sup>321</sup> Ibid.



Organs for the Administration of Justice and approve the UEFA Disciplinary Regulations (DR).<sup>322</sup>

UEFA's influence continued apace into the 1980s. With UEFA's assistance, football for women progressed and forged its own identity with the first European women's competition taking place in 1982.<sup>323</sup> This evolved into the UEFA European Women's Championship in 1989 and an inaugural European women's club competition commenced in 2001–02.<sup>324</sup>

Following the Heysel disaster in Belgium in 1985,<sup>325</sup> UEFA was concerned with improving safety and security at football matches by implementing 'stringent security requirements' and 'all-seated spectators at UEFA matches',<sup>326</sup> These implementations ultimately led to the establishment of UEFA's club licensing system in 2004, the forerunner to the FFP Regulations introduced in 2010.

The 1990s saw UEFA's membership increase substantially with Eastern Europe being reformed following the dissolution of the Soviet Union and the break-up of Yugoslavia.<sup>327</sup> UEFA's membership rose from 35 to 49 between 1992 and 1994.<sup>328</sup> This rapid expansion, although positive for UEFA, also created problems due to the new members' lack of expertise and necessary administrative structures.<sup>329</sup> UEFA had to assist these new member associations address these issues.

The *Bosman* ruling in 1995 by the ECJ also raised issues for UEFA to address. UEFA (and European football generally) was forced 'to make wide-ranging changes to regulations and policies on international transfers, as well as on the fielding by clubs of foreign players'.<sup>330</sup> Other pressing issues in or around this period included 'TV rights matters and the rise of more sophisticated and aggressive marketing techniques; football clubs being quoted on the stock

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<sup>322</sup> Ibid.

<sup>323</sup> UEFA, 'UEFA – the 1990s and new millennium', *EUFA.com* (Web Page, 2017) <[www.uefa.com](http://www.uefa.com)> 1.

<sup>324</sup> Ibid.

<sup>325</sup> The Heysel stadium disaster occurred immediately prior to the European Cup final between Liverpool and Juventus on 27 May 1985 in Brussels. Thirty-nine people were killed when a stadium wall collapsed following crowd violence.

<sup>326</sup> UEFA (n 323) 1.

<sup>327</sup> Vieli (n 7) 101.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> UEFA (n 323) 1. See also *Bosman* (n 81).

market; increasing involvement of political bodies in football; and the growing influence and power of Europe's leading football clubs'.<sup>331</sup>

This was a period in which football grew commercially and in popularity and that in turn presented political and legal challenges for UEFA.<sup>332</sup> UEFA needed to respond but it required a larger staff and budget to do this.<sup>333</sup> When UEFA first arrived in Berne in 1960 it had a staff of three.<sup>334</sup> By 2017, its staff had grown to 455.<sup>335</sup>

The first two decades of the 21<sup>st</sup> century have been dominated by UEFA's introduction of its Club Licensing Regulations (CLR) in 2004 and the addition of the FFP Regulations in 2010. Equally importantly, following those introductions, was the manner in which UEFA has dealt with the major stakeholders involved in European football, including the national associations, the individual football clubs, the players and other personnel associated with the game including player agents and referees, as well as the European Commission from a legal perspective.

These issues are the main areas of this thesis and the FFP Regulations will be considered in Chapter 5 with UEFA's relationships with its main stakeholders studied in Chapter 4.4. Firstly, UEFA's organisational structure and values will be reviewed to examine how it operates and the values it adopts.

### 4.3 *UEFA's Organisational Structure*

UEFA is registered as a society under the Swiss civil code, being neutral politically and religiously.<sup>336</sup> It is the governing body of European football and a (European) Confederation recognised by FIFA.<sup>337</sup> It is 'an association of associations, a representative democracy, and is the umbrella organisation for 55 national football associations across Europe'.<sup>338</sup>

Membership of UEFA is open to national football associations situated in the continent of Europe which are responsible for the organisation and implementation of football-related

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<sup>331</sup> Ibid.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Vieli (n 7) 36.

<sup>335</sup> UEFA, 'UEFA – European football's governing body', *UEFA.com* (Web Page, 2017) <<https://www.uefa.com/insideuefa/>>.

<sup>336</sup> *UEFA Statutes (Edition 2020)* art 1(1).

<sup>337</sup> Ibid art 3(1).

<sup>338</sup> UEFA, 'About UEFA', *UEFA.com* (Web Page, 13 February 2017) <<https://www.uefa.com/insideuefa/about-uefa/>>.

matters in the territory of that country.<sup>339</sup> In exceptional circumstances, a national football association that is situated in another continent may be admitted to membership, provided that it is not a member of the Confederation of that continent, or of any other Confederation, and FIFA approves its membership of UEFA.<sup>340</sup> UEFA's membership rules are clearly drawn up and are uncomplicated.

The rights and duties of member associations are also recorded including the right to take part and vote at the Congress; to take part in UEFA competitions through their representative teams; and to propose candidates from their association for the election of the president of UEFA, the members of the UEFA Executive Committee, the European members of the FIFA Executive Committee, the chairman and members of the judicial organs, and of the committees.<sup>341</sup> The obligations of member associations include observing the principles of fair play; complying with UEFA's Statutes and regulations and decisions of the Court of Arbitration for Sport (CAS); respecting the Laws of the Game as decided by the International Football Association Board (IFAB); applying a club licensing system according to the minimum standards set by UEFA from time to time; and implementing an effective policy aimed at eradicating racism and any form of discrimination.<sup>342</sup>

UEFA has four administrative bodies: the UEFA Congress, the UEFA Executive Committee, the UEFA President, and the organs for the administration of justice.<sup>343</sup>

UEFA's Congress is its supreme controlling organ<sup>344</sup> and is made up of representatives from each member association. It is expected to manage its affairs independently with no influence from third parties. Member associations are also required to provide in their statutes for a procedure guaranteeing that their executive body is freely elected and that their other bodies are elected or appointed in a completely independent way.<sup>345</sup> The representatives from each member association who attend UEFA's Congress need to have been elected or appointed in accordance with the procedure contained in each member association's statute.<sup>346</sup> The president and general secretary of each member association usually attend the annual

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<sup>339</sup> *UEFA Statutes (Edition 2020)* art 5(1).

<sup>340</sup> *Ibid* art 5(2).

<sup>341</sup> *Ibid* art 7.

<sup>342</sup> *Ibid* art 7bis.

<sup>343</sup> *Ibid* art 11. The first three bodies will be considered at this point with the organs for the administration of justice being considered in Chapter 5.6.

<sup>344</sup> *Ibid* art 12(1).

<sup>345</sup> *Ibid* art 7bis(2).

<sup>346</sup> *Ibid*.

Congress,<sup>347</sup> with each member association being allowed one vote, which is exercised on its behalf by one of its representatives.

An extraordinary Congress can be convened by the Executive Committee or, at the written request of one fifth or more of the member associations.<sup>348</sup> Article 13 sets out the powers of congress which include the election of the UEFA President, members of the Executive Committee, European members of the FIFA Executive Committee and the auditing body; considering the president's and Executive Committee's report and the administration's report; approval of the annual accounts and annual budget; amendments to the Statutes; consideration and taking of decisions on proposals; and consideration of membership applications and the exclusion of a member association.<sup>349</sup> The rules relating to Congress reveal the democratic nature of the organisation and that, as its key body, it has the necessary powers to exert its authority when required.

The Executive Committee comprises the president and sixteen other members including at least one female elected by Congress.<sup>350</sup> Only one representative from the same member association can be on the Executive Committee at any one time<sup>351</sup> and each member of the Executive Committee, apart from the president, must hold active office within his or her member association.<sup>352</sup> The term of office is four years with members being eligible for re-election,<sup>353</sup> although a person aged 70 or more is not eligible for election or re-election.<sup>354</sup> The Executive Committee can adopt regulations and can make decisions on matters which are not the responsibility of Congress or another organ of UEFA.<sup>355</sup> The Executive Committee is expected to manage UEFA, except to the extent that it has delegated such management or, unless such management has been delegated by the Statutes to the president or the administration.<sup>356</sup>

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<sup>347</sup> Mark Chaplin, 'Everything you need to know about Congress', *UEFA.com* (Web Page, 4 April 2017) <<https://www.uefa.com/insideuefa/about-uefa/news/0238-0f8e4f534d6a-077ebd854ac6-1000--everything-you-need-to-know-about-congress/>>.

<sup>348</sup> *UEFA Statutes (Edition 2020)* art 14(1).

<sup>349</sup> *Ibid* art 13(2).

<sup>350</sup> *Ibid* art 21(1).

<sup>351</sup> *Ibid* art 21(2).

<sup>352</sup> *Ibid* art 21(3).

<sup>353</sup> *Ibid* art 22(1).

<sup>354</sup> *Ibid* art 22(2).

<sup>355</sup> *Ibid* art 23(1).

<sup>356</sup> *Ibid* art 23(2).

The duties of the Executive Committee are dealt with in Article 24. These include the overall control of UEFA and the issue of necessary instructions; the definition of the organisational structure; the form and supervision of the book-keeping; the appointment of three governance and compliance auditors and the issue of their terms of reference; the appointment of the general secretary and deputy secretary upon proposal by the president; overall supervision of the administration and approval of the annual business plan of the administration.<sup>357</sup>

The Executive Committee can delegate the preparation and implementation of its decisions or the supervision of its business to one or more of its members.<sup>358</sup> The rules in regard to delegation are contained in the UEFA Organisational Regulations.<sup>359</sup> These provide the Executive with the authority to delegate management, either fully or partly, to the president, to one or more of its members and/or to the administration.<sup>360</sup> The Organisational Regulations also provide rules for the governance of management, defining positions, outlining corresponding duties and appropriate reporting.<sup>361</sup> There are relevant delegations in place to allow the Executive Committee to delegate its powers when required.

Meetings of the Executive Committee take place generally every two months and are convened by the president.<sup>362</sup> An additional meeting can be convened by the president if a request is received from five voting members.<sup>363</sup> The president also has the power to invite third parties to attend meetings of the Executive Committee in an advisory capacity.<sup>364</sup> The Executive Committee has 19 committees<sup>365</sup> which provide it with advice.<sup>366</sup> The committees are formed by the Executive Committee which, based on proposals submitted by the president, elects the chairman, one or more vice-chairmen and the members of each committee for a four year period.<sup>367</sup> The Executive Committee draws up terms of reference for the work of each committee<sup>368</sup> and can also delegate certain duties to a committee.<sup>369</sup> Expert panels for special

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<sup>357</sup> Ibid art 24(1).

<sup>358</sup> Ibid art 24(2).

<sup>359</sup> UEFA Organisational Regulations (Edition 2018).

<sup>360</sup> *UEFA Statutes (Edition 2020)* art 25(1).

<sup>361</sup> Ibid art 25(2).

<sup>362</sup> Ibid art 26(1).

<sup>363</sup> Ibid art 26(1).

<sup>364</sup> Ibid art 26(1).

<sup>365</sup> Ibid art 35ter.

<sup>366</sup> Ibid art 37(3).

<sup>367</sup> Ibid art 36(1).

<sup>368</sup> Ibid art 37(4).

<sup>369</sup> Ibid art 37(3).

duties and working groups for special limited (in time) duties can be appointed by the Executive Committee, the president or the general secretary.<sup>370</sup>

Administration of the Executive Committee's work is conducted under the direction of the general secretary.<sup>371</sup> Duties of the administration include implementing the decisions of congress, the Executive Committee and the president.<sup>372</sup> The general secretary governs the duties of employed directors, who conduct specific aspects of UEFA's business.<sup>373</sup> Directors are expected to attend meetings of the Executive Committee dealing with their specific activities, and play an advisory role in the deliberations.<sup>374</sup> There are, therefore, appropriate arrangements in place to provide support for the Executive Committee.

To oversee UEFA's operations, a governance and compliance committee is used 'to periodically examine UEFA's activities in terms of good governance, compliance and risk management'.<sup>375</sup> It comprises five members appointed by the Executive Committee, three of whom are from member associations and the other two are independent appointees.<sup>376</sup> The Committee reports to the Executive Committee on every audit, providing a copy of the report to the general secretary.<sup>377</sup> UEFA's accounting is conducted internally with a budget prepared annually.<sup>378</sup> An independent auditing body audits the accounts and submits a written report to the Ordinary Congress.<sup>379</sup> There is therefore clear evidence that UEFA has sufficient checking mechanisms in place to ensure the organisation is appropriately run.

The president's position changed to a full-time role in 2007 when Michel Platini was elected to the office.<sup>380</sup> The new role for the president meant the position of chief executive officer (CEO) was no longer required and the CEO's role was replaced by a general secretary.<sup>381</sup> The new role of the president, which still continues today, is to represent UEFA,<sup>382</sup> and to chair Congress as well as meetings of the Executive Committee.<sup>383</sup> The president is also responsible

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<sup>370</sup> Ibid art 38(1).

<sup>371</sup> Ibid art 39(1).

<sup>372</sup> Ibid art 39(2).

<sup>373</sup> Ibid arts 40 (1) and (2).

<sup>374</sup> Ibid art 41(2).

<sup>375</sup> Ibid art 35bis(1).

<sup>376</sup> Ibid art 35bis(2).

<sup>377</sup> Ibid art 35bis(3).

<sup>378</sup> Ibid art 43.

<sup>379</sup> Ibid arts 46(1) and 46(2).

<sup>380</sup> Viel (n 7) 133. This had been part of his election manifesto.

<sup>381</sup> Ibid 134.

<sup>382</sup> *UEFA Statutes (Edition 2020)* art 29(1).

<sup>383</sup> Ibid art 29(2).

for relations between UEFA and FIFA, other confederations, its member associations, political bodies and international organisations, as well as implementing the decisions of Congress and the Executive Committee.<sup>384</sup>

#### 4.4 UEFA and its Values

To understand how an organisation is operating, how it is thinking, what it is seeking to achieve, it is necessary to delve behind its immediate actions to determine its values and strategies UEFA had initially relied on the objectives contained in its Statutes as a written explanation of its aims.<sup>385</sup> However, in 2005, almost certainly inspired by the difficulties it was having in re-establishing its role as the leader of European football following the *Bosman* ruling and the uncertain environment thereafter, it produced its Vision Europe document. This was approved by the UEFA Congress in Tallinn.<sup>386</sup> Vision Europe was ‘published in the form of a 38-page brochure’<sup>387</sup> and was meant to provide details of UEFA’s strategies and ‘serve as a guide during a period of significant and rapid change’.<sup>388</sup>

Although the Vision Europe document was described by England’s *Guardian* newspaper ‘as an enlightened strategy document’<sup>389</sup> and ‘a blueprint for football that asks the right questions’<sup>390</sup> it did not remain as a guiding UEFA document for very long. When Platini became president in 2007, he developed the 11 UEFA values which, although more simply and clearly expressed, are strikingly similar to the values contained in the Vision Europe document.

UEFA’s eleven values, first presented to UEFA’s 23<sup>rd</sup> Congress in Copenhagen in March 2009<sup>391</sup> are:

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<sup>384</sup> Ibid art 29(4).

<sup>385</sup> Vieli (n 7) 131.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

<sup>388</sup> Ibid. The then UEFA CEO, Lars-Christer Olsson, said ‘Over the past ten years, when interest in the game as a televised sport in particular has grown out of all proportion to the previous four decades of UEFA’s existence, various initiatives have sprung up all over the continent. But UEFA is the only organisation that has gone through the process of asking itself why it exists, what it believes in, where it wants to be, how it is going to get there and then writing it all down in a coherent way and making it available to the public. Vision Europe outlines UEFA’s purpose, its philosophy, its history and its direction, and it has been approved by every national football association across Europe.’ See UEFA, ‘Vision Europe goes online’, *UEFA.com* (Web Page, 3 December 2005) <[www.uefa.com](http://www.uefa.com)>.

<sup>389</sup> UEFA, ‘Vision Europe’, *UEFA.com* (Web Page, 10 February 2006) <<https://www.uefa.com/newsfiles/374875.pdf>>.

<sup>390</sup> Ibid.

<sup>391</sup> Mark Chaplin, ‘The values of UEFA for European football’s future’, *UEFA.com* (Web Page, 27 March 2009) <<https://www.uefa.com/insideuefa/about-uefa/news/01d7-0f85b44dbb55-e73ac91a5ffb-1000--the-values-of-uefa-for-european-football-s-future/>>.

1. Football first;
2. Pyramid structure and subsidiarity;
3. Unity and leadership;
4. Good governance and autonomy;
5. Grassroots football and solidarity;
6. Youth protection and education;
7. Sporting integrity and betting;
8. Financial fair play and regularity of competitions;
9. National teams and clubs;
10. Respect;
11. European sports model and specificity of sport.<sup>392</sup>

These values now underpin everything UEFA does and are core to understanding how and why the FFP Regulations were introduced to improve the financial viability of European football.

The first of the values, “football first”, means that ‘the emphasis that football and the need to defend its interests, must always be the first and most important element that UEFA takes into consideration in its work’.<sup>393</sup> The supporting statement includes the sentence, ‘[f]ootball is a game before being a product, a sport before being a market, a show before being a business’.<sup>394</sup> In a commercial world, it is often difficult to segregate commercial opportunity from what is best for the product itself in the longer term. This difficulty is heightened because, often, taking advantage of commercial opportunities can produce income which can be spent usefully on improving the product. The important consideration here is to ensure income obtained from commercial opportunities is fed back into the product. This is particularly true in the case of an organisation like UEFA which is not-for-profit and professes to be supporting all levels of football from grassroots to the elite.

UEFA’s HatTrick V Regulations Edition 2020 is an example of how UEFA uses its income from its competitions to regularly support all levels of football and provide ‘financial support to the UEFA member associations in their tasks to develop and foster football at all levels within their territories’.<sup>395</sup> These Regulations cover a four year period from 1 July 2020 to

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<sup>392</sup> Ibid.

<sup>393</sup> Ibid.

<sup>394</sup> Ibid.

<sup>395</sup> UEFA, *UEFA HatTrick V Regulations Edition 2020* art 1(1).



30 June 2024.<sup>396</sup> Article 4(2) reveals details of the funding plans, consisting of a series of maximum amounts for the whole four year financial period.<sup>397</sup> These include €4.5 million per UEFA member association for development projects,<sup>398</sup> an annual contribution of a maximum of €2.4 million per UEFA member association<sup>399</sup> composed of the following maximum amounts: €800,000 as an annual solidarity payment to cover the current running costs of the UEFA member association,<sup>400</sup> and €1.6 million in annual incentive payments.<sup>401</sup>

The second value is ‘pyramid structure and subsidiarity’ with ‘pyramid structure’ referring to the organisational levels of football with FIFA at the top followed by the Confederations, of which UEFA is the European one, and then the national associations running down to grassroots football at the base of the pyramid.<sup>402</sup> Subsidiarity is linked with the pyramid structure on the basis that UEFA is keen to devolve much of the decision-making to its individual national associations on the basis that the national associations are much better placed to be making decisions about football in their own countries.<sup>403</sup> UEFA appreciates that each country is different and that, therefore, a one-cap-fits-all approach would not work. Consequently, it favours establishing basic standards with which each individual national association must comply, but also allowing each national association the flexibility to implement policy in a manner suitable to their particular country.<sup>404</sup> This seems to be a reasonable approach for UEFA to adopt and one which it considered when introducing its FFP Regulations. It was important for UEFA to adopt Regulations that could be similarly used in each of its member countries to maintain consistency and uniformity, as will be discussed further in Chapter 7.

‘Unity and leadership’ is the third value with ‘unity’ being a key word for UEFA and the reason for its desire to maintain the pyramid structure.<sup>405</sup> UEFA sees keeping all involved in football within the same group as critically important. In UEFA’s ideal world there would be ‘a united football family – when football is united we can achieve extraordinary things’.<sup>406</sup> It

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<sup>396</sup> Ibid art 3(2).

<sup>397</sup> Ibid art 4(2).

<sup>398</sup> Ibid art 4(2)(a).

<sup>399</sup> Ibid Art 4(2)(b).

<sup>400</sup> Ibid Art 4(2)(b)(i).

<sup>401</sup> Ibid Art 4(2)(b)(ii).

<sup>402</sup> Chaplin (n 391), 2.

<sup>403</sup> UEFA (n 389) 12.

<sup>404</sup> Ibid.

<sup>405</sup> Chaplin (n 391) 2.

<sup>406</sup> UEFA (n 389) 8.

sees itself as representing all levels of football from grassroots to the elite clubs. UEFA does not wish to ‘operate by dictat’<sup>407</sup> and ‘will continue to show leadership, but operate in a spirit of consensus’.<sup>408</sup> UEFA has taken this approach in respect of the FFP Regulations by seeking the support of all stakeholders involved in European football before the FFP Regulations were introduced and then being prepared to make changes to them through, for instance, the introduction of the voluntary agreement (see Chapter 7) to maintain that unity.

The fourth value is ‘good governance and autonomy’ which UEFA supports and sees as involving ‘openness, democracy, transparency and responsibility’.<sup>409</sup> UEFA promotes good governance through its club licensing regulations which it administers through the national associations and through the FFP Regulations where it carries out a monitoring process to ensure compliance. UEFA also provides solidarity payments in the area of good governance to encourage the development of better processes under the UEFA HatTrick V Regulations.<sup>410</sup> It also provides education in the area of governance to executives working for national associations under the Top Executive Programme.<sup>411</sup>

‘Grassroots football and solidarity’ is the fifth value with UEFA promoting the nurturing of grassroots football and the need to strengthen solidarity, ‘both to protect the future of football and to deliver the wider benefits that our sport brings to society as a whole’.<sup>412</sup> It takes the view ‘that the elite level of the game cannot flourish without a healthy basis, and given that football should be open to everyone’.<sup>413</sup> UEFA runs a Grassroots Week, which ‘celebrates football’s essential soul across the continent’.<sup>414</sup> There are the UEFA grassroots awards which ‘reward excellence in the grassroots sector, and the UEFA Grassroots Charter stimulates national associations to further develop their domestic grassroots activities’.<sup>415</sup> Grassroots football links with solidarity via the HatTrick programme which provides encouragement in the form of monetary payments to national associations for contribution to grassroots areas of the game, including the development of women’s and youth football.<sup>416</sup> This important value

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<sup>407</sup> Chaplin (n 391) 2.

<sup>408</sup> Ibid.

<sup>409</sup> Ibid.

<sup>410</sup> UEFA, UEFA HatTrick V Regulations Edition 2020.

<sup>411</sup> UEFA, ‘Top Executive Programme’, *UEFA.com* (Web Page, viewed 19 April 2017) <<https://www.uefa.com/insideuefa/football-development/top-executive-programme/>>.

<sup>412</sup> Ibid 5.

<sup>413</sup> UEFA, ‘Football Development’, *UEFA.com* (Web Page, 3 September 2019) <<https://www.uefa.com/insideuefa/football-development/>>.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> *UEFA HatTrick V Regulations Edition 2020* art 2(3)(b)(ii).

is assisted by the FFP Regulations because they help to provide financial stability to the higher echelons of European football, thus enabling UEFA's competitions to provide support for the grassroots and lower levels of the game.

The sixth value is 'youth protection and education' with UEFA maintaining that, as the governing body of European football, it 'has a sporting and moral responsibility'.<sup>417</sup> It has major concerns about the wealthiest clubs stockpiling the best young players, which led to its introduction of the homegrown player rule which, from the 2008–09 season has meant that clubs competing in the UEFA Champions League and UEFA Europa League require a minimum of eight homegrown players in their 25 man squads.<sup>418</sup> However, consideration of youth goes beyond the one issue of contracting young players. UEFA sees 'a world where the social, educational and cultural benefits of football and sport are fully utilised and fully appreciated'.<sup>419</sup> It places emphasis on youth football with the training of youth team coaches and the provision of regional and national youth training centres and football academies under its HatTrick programme.<sup>420</sup> Educational programmes are also provided 'especially for young players, in order to increase awareness of the risks of match-fixing and ensure that all those involved in football are aware of, and respect, the relevant rules'.<sup>421</sup> They also apply in relation to anti-doping matters.<sup>422</sup> The money to support youth programmes comes from the competitions that UEFA runs and the FFP Regulations assist in ensuring the integrity of those competitions.

The same line of thinking can also be applied to the seventh value of 'sporting integrity and betting'. As the UEFA competitions are the chief source of income for the organisation, it is essential that they do not become tainted with match-fixing, doping or other malfeasances. The HatTrick IV Regulations provide for an annual incentive of up to €50,000 to be made available to each UEFA member association for integrity activities,<sup>423</sup> including the appointment of an integrity officer whose tasks consist of providing regular information to

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<sup>417</sup> Ibid 6.

<sup>418</sup> Ibid. UEFA introduced the rule in three phases. In the 2006–07 season, the requirement was a minimum of 4 homegrown players per 25-man squad. The figure increased to 6 for the 2007–08 season and again to 8 for the 2008–9 season. UEFA carried out considerable consultation before implementing the rule and the rule contained no nationality conditions as UEFA was very concerned not to infringe European law. In fact, the European Commission confirmed that the rule was valid in May 2008.

<sup>419</sup> UEFA (n 389) 8.

<sup>420</sup> *UEFA HatTrick V Regulations Edition 2020* art 8(2)(c).

<sup>421</sup> Ibid art 21(1)(b).

<sup>422</sup> UEFA, 'Anti-doping', *UEFA.com* (Web Page, viewed 19 April 2017) <<https://www.uefa.com/insideuefa/protecting-the-game/anti-doping/>>.

<sup>423</sup> *UEFA HatTrick V Regulations Edition 2020* art 21.

UEFA on corruption within football and investigating information received from UEFA and other sources regarding corruption.<sup>424</sup>

The eighth value is ‘financial fair play and the regularity of competition’ with UEFA stating that:

[i]t supports fair play both on and off the pitch. Financial fair play means that clubs operate transparently and responsibly to protect both sporting competition and the clubs themselves. Financial fair play means clubs not getting into a spiral of debt to compete with their rivals but rather competing within their own means, i.e. the resources they generate.<sup>425</sup>

UEFA wants its measures to ‘bring greater stability to club football, and to end the financial indiscipline and excesses that have marred the game and endangered the existence of many clubs’.<sup>426</sup> The regularity of competitions is crucial to UEFA and its links with the FFP are obvious. There is a chance that a team falling into financial difficulties could face not being able to participate in a competition which would cause disruption and a lack of credibility for the competition. Most of UEFA’s funding comes from competitions. Over 300 million people watched the last EURO in 2016.<sup>427</sup>

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<sup>424</sup> Ibid arts 21(1)(a)(i) and 21(1)(a)(ii). Note the other major area relating to sporting integrity that UEFA concentrates on is doping in sport. UEFA states that it ‘continually strives to ensure that its education and testing programmes remain at the cutting edge of science and recognized good practice in all areas of prevention and detection’. See UEFA (n 275) 1. Cooperation agreements between UEFA and approximately 30 European Anti-Doping Organisations allow for the coordination of anti-doping programmes and testing activities and the exchange of information and intelligence. Regular testing of players takes place and this is linked to the athlete biological passport which can be used to reveal changes in blood or steroid profile. In the 2015–16 season, 2,242 samples were collected within the framework of the EURO 2016 testing programme, and a total of 2,542 samples were collected by UEFA in its other club and national team competitions. Samples are retained for 10 years and they can be re-analysed due to specific intelligence or when new analytical techniques become available. UEFA has 55 doping control officers, all of whom are medically qualified to administer its anti-drugs agenda, and it also distributes informational material and runs educational programmes. New doping control officers undertake UEFA’s in-depth training programme and subsequently undergo regular auditing to ensure improvements where necessary in the quality of doping controls, and a uniformly high standard of procedure. See UEFA (n 275) 1.

<sup>425</sup> Chaplin (n 391) 2.

<sup>426</sup> Ibid.

<sup>427</sup> Scott Roxorough, ‘Amid FIFA Scandal, EBU Buys Euro 2016 Rights’, *Hollywood Reporter* (Web Page, 24 June 2015) <<https://www.hollywoodreporter.com/news/ebu-buys-euro-2016-rights-804720>>. UEFA has built up its competitions to have more matches in each, for instance, the UEFA European Championship grew from four teams in the 1960 final tournament to 24 teams in the 2016 competition finals. It also introduced its UEFA Nations League, a further competition for national teams that takes place between European Championships, rather than have them play uninspiring friendly games. The first UEFA Nations League competition was won by Portugal in 2019. See UEFA, ‘UEFA Nations League: all you need to know’, *UEFA.com* (Web Page, 26 June 2020) <<https://www.uefa.com/uefanationsleague/news/0258-0e2bb376a99e-1984c4ff291f-1000--nations-league-lowdown/>>.

‘National teams and clubs’ is the ninth value and it focuses on achieving the right balance between national teams and club football. UEFA acknowledges that both ‘are vital and complementary elements of football’<sup>428</sup> and remains ‘committed to ensuring that this balance is maintained and even strengthened, as the development of our game at national, European and international level depends on it’.<sup>429</sup>

The tenth value is ‘respect’ with UEFA stating that ‘[r]espect is a key principle of football. Respect for the game, integrity, diversity, dignity, players’ health, rules, the referee, opponents and supporters. Our message is clear: zero tolerance against racism, violence and doping.’<sup>430</sup> UEFA has developed a football and social responsibility programme ‘aimed at strengthening the health and integrity of both football and society as a whole, and the core pillar of Respect is integral to this’.<sup>431</sup> There are a number of elements to this social responsibility programme and these include the condemnation of racism,<sup>432</sup> women and their role in football, the<sup>433</sup> assisting players with intellectual disabilities,<sup>434</sup> health,<sup>435</sup> and the environment.<sup>436</sup> The financial support for UEFA’s Respect programme comes from funds provided by its competitions and this would not be possible if the integrity of its competitions was compromised.

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<sup>428</sup> Chaplin (n 391) 3.

<sup>429</sup> Ibid.

<sup>430</sup> Ibid.

<sup>431</sup> UEFA, ‘Respect’, *UEFA.com* (Web Page, viewed 19 April 2017) <[www.uefa.com/respect](http://www.uefa.com/respect)>.

<sup>432</sup> Since 2001, UEFA has been in partnership with the FARE network (Football against Racism in Europe) and match day 3 in the UCL and UEL1 are devoted each year to the fight against racism. UEFA also plays a prominent role in FARE action weeks where ‘workshops, roundtable discussions and mini-football tournaments involving fans, clubs, national associations, ethnic minority groups and youth organisations’ take place. See UEFA, ‘No to Racism’, *UEFA.com* (Web Page, viewed 19 April 2017) <<https://www.uefa.com/say-no-to-racism>>.

<sup>433</sup> Competitions for women, such as the Women’s European Championship and the UEFA Women’s League, are now firmly established. There are now more than 1,270 million registered female players in Europe. See UEFA, ‘Women’s football’, *UEFA.com* (Web Page, viewed 17 April 2017) <<https://www.uefa.com/women/>>. UEFA devised its Women’s Football Development Programme and provides an annual incentive of up to €100,000 to each member association for implementing the UEFA women’s football development programme. See *UEFA HatTrick IV Regulations Edition 2016* art 18.

<sup>434</sup> UEFA established the Special Olympics Europe Eurasia – UEFA Football Development Project in 1998 and this enables players with intellectual disabilities to be become involved in football. See UEFA, ‘Disability’, *UEFA.com* (Web Page, viewed 19 April 2017) <[www.uefa.disability/](http://www.uefa.disability/)>.

<sup>435</sup> UEFA partnered with the World Heart Federation and the European Commission to publish the ‘Eat for Goals’ book. Its aim is to encourage children to lead more active lifestyles and to eat well. See UEFA, ‘Health’, *UEFA.com* (Web Page, viewed 19 April 2017) <https://www.uefa.com/insideuefa/protecting-the-game/health/>.

<sup>436</sup> UEFA aims to protect and restore the environment. It has actively participated in the World Wildlife Fund’s Earth Hour and realising that its major source of greenhouse gas emissions is air travel began in 2009 ‘a one-year emissions reduction trial, consisting primarily of purchasing internationally recognized renewable energy carbon credits’. See UEFA, ‘Environment’, *UEFA.com* (Web Page, viewed 19 April 2017) <<https://www.uefa.com/insideuefa/protecting-the-game/environment/>>.

‘The European sports model and specificity of sport’ is the eleventh value with UEFA’s position always being that it and its member associations should be working towards ‘full independence for the football family’<sup>437</sup> and that ‘football is able to work in different legal contexts as long as the autonomy of the football movement and its structures are respected’.<sup>438</sup>

It states:

UEFA is a European body and we remain totally committed to the European model of sport, a model characterized by promotion and relegation, the solidarity principle, as well as open competitions and opportunity for all. This is what sport – especially football – is all about. We have to protect this model because sport is not simply a business like any other and we cannot allow it to be treated as such. We will continue to defend the specificity of sport and are convinced that our arguments will prevail for the good of football.<sup>439</sup>

The legal aspects of this matter will be examined in more detail in Chapter 6. More immediately, however, consideration will be given to UEFA’s relationship with its stakeholders.

#### *4.5 UEFA’s Relationship with its Stakeholders*

UEFA is ‘an association of associations’<sup>440</sup> with the role of representing and governing football in Europe. It has always appreciated the nature of its role and the importance of its relationships with stakeholders also involved in football. Its rationale in Vision Europe was that:

As a principle, a better relationship with key stakeholders, and a better understanding of their views, makes it easier to communicate, easier to educate and leads to better decision-making. It also leads to greater support for the current structures in times of difficulty or tension.<sup>441</sup>

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<sup>437</sup> UEFA (n 389) 31.

<sup>438</sup> Ibid 11.

<sup>439</sup> Chaplin (n 391) 3.

<sup>440</sup> UEFA (n 389) 7.

<sup>441</sup> Ibid 29. UEFA elaborated on its rationale by adding that ‘[a]lthough currently the waters in European football appear calm, it is sure that major challenges lay ahead – some identified in the previous sections of this report and some no doubt unidentified. There may be some form of breakaway challenge to the current structures in future, although UEFA is constantly working to reduce its likelihood. Therefore the football family structures need to continue evolving in order to stay one step ahead of the changing environment and possible events.’ See Ibid 30.

Although there is no specific allotment of ‘stakeholders’ to any of UEFA’s eleven values they were mentioned in relation to the third value – Unity and leadership – where UEFA provides a commitment to ‘involve all stakeholders (leagues, clubs, players) in the decision-making process in European football, in particular through the Professional Football Strategy Council (PFSC) so that the Executive Committee can take the right decisions’.<sup>442</sup> UEFA has worked relentlessly with its stakeholders to secure support for its measures and in particular its FFP Regulations. An example of UEFA’s effort in this respect is the PFSC which was a new body formed as part of Platini’s changes in 2008. It is not entirely novel as it had links with the European Professional Football Strategy Forum, which had met in January 2007, but the composition of the Council is slightly different as it also includes club representation. Although part of UEFA’s organisational structure, it is set up independently of UEFA with its own board and secretariat in Nyon.

The PFSC comprises the following:

- a) Four UEFA vice-presidents (i.e. all but the vice-president chairing the Finance Committee), who represent the interests of UEFA’s member associations as well as the general interests of UEFA as European football’s governing body.<sup>443</sup>
- b) Four representatives elected for a two-year term by the group recognised by UEFA as representing the interests of the European professional football leagues.<sup>444</sup>
- c) Four representatives elected for a two-year term by the group recognised by UEFA as representing the interests of the clubs participating in the UEFA competitions.<sup>445</sup>
- d) Four representatives elected for a two-year term by the players’ union recognised by UEFA as representing the interests of professional players in Europe.<sup>446</sup>

The main tasks of the Council include identifying solutions for improving collaboration between the various stakeholders in European football, working with the existing professional football consultative bodies on all relevant issues, and discussing the views of the clubs,

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<sup>442</sup> UEFA (n 391) 3.

<sup>443</sup> UEFA, ‘Professional Football Strategy Council’, *UEFA.com* (Web Page, 2015) <<https://www.uefa.com/insideuefa/stakeholders/professional-football-strategy-council/>>.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

leagues, players and UEFA's member associations, including questions related to the UEFA club competitions and their calendars.<sup>447</sup> The Council reports directly to the Executive Committee in its advisory role, and 'exercises a major influence on the decision-making of the Executive Committee'.<sup>448</sup> The PFSC, which brings the main stakeholders involved in European football together, is a useful tool for UEFA in its efforts to generate consensus for its proposals, including its FFP Regulations.

Following the *Bosman* decision,<sup>449</sup> UEFA appreciated the need to have the backing of its stakeholders if it was going to make significant inroads into its mandate of looking after the interests of European football, especially as this would sometimes involve contentious issues like the initiation of the FFP Regulations. UEFA acknowledged there were various groups of stakeholders, all of which needed to be considered. These include those internal to UEFA (national associations), those external to UEFA but within the football family (leagues, clubs, players and supporters), and those external to UEFA but outside the football family (European Union Institutions, particularly the European Commission).<sup>450</sup> It is proposed now to briefly look at what UEFA has done to nurture the interests of its stakeholders and the steps it took to incorporate the interests of those stakeholders into its actions.

National associations are integral to UEFA. It is the associations that UEFA is representing and the associations are key players in UEFA's organisational structure in that they operate as UEFA's 'agent' in their respective countries. With Platini elected as President of UEFA in 2007, power was returned to the national associations with the Football Organisation Redesign for the next Century in Europe (FORCE) project being terminated.<sup>451</sup> The number of committees was increased to 19 allowing at least two delegates from each national association to be involved, which forged closer links between UEFA and the associations.<sup>452</sup> Platini also made changes to the conferences for the presidents and general secretaries of national associations, which had been used by UEFA to communicate material to members.<sup>453</sup> These conferences had become 'more informative than advisory and

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<sup>447</sup> Ibid. See also *UEFA Statutes (Edition 2020)* art 35(4).

<sup>448</sup> *UEFA Statutes (Edition 2020)* art 35(3).

<sup>449</sup> *Bosman* (n 81).

<sup>450</sup> UEFA (n 389) 30.

<sup>451</sup> Vieli (n 7) 134. The FORCE Project (Football Organisation Redesign for the next Century in Europe) had been introduced by UEFA in 2000. This transferred some of the powers of the delegates of the national associations to the newly established CEO position and the UEFA administration.

<sup>452</sup> Ibid.

<sup>453</sup> Vieli (n 7) 145.



interactive'<sup>454</sup> but Platini turned them into strategy meetings allowing national association representatives to tell the Executive Committee which direction they wanted it to take.<sup>455</sup> UEFA also involved the national associations in their deliberations in regard to the FFP Regulations and obtained their approval as required by the UEFA Statutes.

The football leagues became involved with UEFA in 1964 when the International Liaison Committee of Football Leagues, formed in 1958, were offered seats on UEFA's Committee for Non-Amateur and Professional Football (CNPFF) on the basis that they would dissolve their own committee.<sup>456</sup> In 1968, the Committee increased in size from 11 to 17 to provide for a representative from each national association that organised a non-amateur championship.<sup>457</sup> The CNPFF was replaced in March 1998 by the Professional Football Committee, 'comprising representatives of Europe's major professional leagues'.<sup>458</sup> These leagues had formed a European association in 1997, which became the European Professional Football Leagues (EPFL) in 2005.<sup>459</sup> In 1998, a Memorandum of Understanding was signed by UEFA and the leagues setting out the leagues' objectives<sup>460</sup> while focusing on the need to avoid any conflict with UEFA.<sup>461</sup> Further Memoranda were signed in 2005<sup>462</sup> and 2009.<sup>463</sup> Under current arrangements, the EPFL elects four members to the PFSC,<sup>464</sup> and the present situation appears to provide adequately for a proper consideration of the EPFL's views on European football matters.

UEFA's relationships with the larger football clubs have been more difficult than those with the leagues. The prospect of greater financial reward encouraged the larger clubs to consider competitions other than those organised by UEFA. In 1998, a firm of international investors, Media Partners, approached the large European clubs 'with the promise of revenue out of all proportion with what they could earn from the Champion's League if they joined the new

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<sup>454</sup> Ibid.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid 122.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid.

<sup>460</sup> The objectives were to protect clubs, promote national championships and improve relations between the leagues in different countries.

<sup>461</sup> Vieli (n 7) 122.

<sup>462</sup> Ibid.

<sup>463</sup> UEFA, 'Leagues', *UEFA.com* (Web Page, viewed 19 April 2017)

<<https://www.uefa.com/insideuefa/stakeholders/leagues/>>.

<sup>464</sup> Ibid.

SuperLeague, accompanied by a ProCup'.<sup>465</sup> The SuperLeague concept was to have '36 prominent clubs, split into three groups, with play-off matches at the end of the season.'<sup>466</sup> The ProCup would have had 96 clubs involved in a direct 'knockout system'.<sup>467</sup>

UEFA was not surprised by this proposal and since 1995 had been holding club workshops at which the remaining teams at the knockout stage of the UCL for that season were invited to a meeting 'to improve cooperation and gain experiences and ideas'.<sup>468</sup> The workshops soon included more clubs and by 1999 new criteria were utilised to decide which clubs would be invited to attend, with 50 clubs 'chosen from the top 27 national associations in the UEFA rankings'.<sup>469</sup> In 1999, a Club Advisory Board was also created 'with a view to stepping up UEFA's dialogue with the clubs'<sup>470</sup> but this was soon disbanded in the wake of UEFA's restructure through the FORCE project.<sup>471</sup> The clubs, however, were not completely ignored in the restructure, with a panel of 62 clubs being formed, each of which could be invited by the Club Competitions Committee 'to work on various specific topics'.<sup>472</sup>

Notwithstanding UEFA's efforts, 14 major European clubs set up an interest group, the G14, in 2000.<sup>473</sup> The aims of this group included defending 'the interests of member clubs' and negotiating 'with FIFA and UEFA regarding the format, administration and organisation of their club competitions'.<sup>474</sup> As a result, UEFA's Executive Committee indicated it would encourage broader discussions about the format of the club competitions at its annual workshop, to which the 62 clubs on the UEFA Club Panel were invited.<sup>475</sup> In 2002, the club workshops were replaced with the European Club Forum, with UEFA CEO Aigner reporting that 'this platform, set up so as to maintain an ongoing dialogue with the clubs, reflects UEFA's general desire to keep its finger on the pulse of football and to listen to all its various voices'.<sup>476</sup> Notably the Forum included the vast majority of the G14 clubs and, although

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<sup>465</sup> Vieli (n 7) 119.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

<sup>468</sup> Ibid 123.

<sup>469</sup> Ibid.

<sup>470</sup> Ibid.

<sup>471</sup> Ibid.

<sup>472</sup> Ibid 124.

<sup>473</sup> Ibid.

<sup>474</sup> Ibid 125.

<sup>475</sup> Ibid.

<sup>476</sup> Gerhard Aigner, 'The need to communicate', *UEFA.com* (Web Page, September 2002)

<[https://editorial.uefa.com/resources/01e0-0f8426a8c4df-cb67be9a81fc-1000/uefadirect\\_06\\_09.2002\\_.pdf](https://editorial.uefa.com/resources/01e0-0f8426a8c4df-cb67be9a81fc-1000/uefadirect_06_09.2002_.pdf)>.

restricted to being an advisory body, ‘it was invited to provide its views on the future development of the UEFA competitions and the related revenue distribution models, as well as on issues of general interest concerning club football’.<sup>477</sup>

Further progress was made with clubs in 2008 when the European Club Association (ECA) replaced the European Club Forum.<sup>478</sup> This replacement body was an independent entity not managed by UEFA but it did sign a Memorandum of Understanding with UEFA, in which the new body was recognised ‘as the only authority defending the clubs’ interests at European level’.<sup>479</sup> UEFA also agreed to it being granted four seats on the then newly formed PFSC.<sup>480</sup> All clubs involved in the European Club Forum were invited to join the ECA and its initial membership of 103 clubs had been extended to 214 clubs by 2014.<sup>481</sup> The Memorandum of Understanding led to the dissolution of the G14 group and the settlement of a longstanding dispute between UEFA and the clubs over payment to clubs when their players competed in international competitions for their national teams.<sup>482</sup> UEFA agreed for compensation to be paid in this respect for the 2008 European Championship and FIFA agreed similarly for the 2010 World Cup.<sup>483</sup> A further Memorandum of Understanding was signed with the ECA in 2012.<sup>484</sup> Consequently, although there was a difficult period in the relationship between UEFA and the major European football clubs, the differences have to a great extent been resolved and the relationship has considerably improved now. It is interesting to note that acceptance by the clubs of the FFP Regulations was obtained prior to their introduction. Although several clubs have questioned UEFA’s enforcement of the FFP Regulations and have had UEFA’s decisions reviewed by CAS, the two actions commenced against UEFA in the European Court were not by the clubs, but by a player’s agent and disgruntled fans.

The main union representing European footballers is FIFPro Division Europe (FIFPro) which is the European association of national player trade unions comprising 29 member associations.<sup>485</sup> In October 2007, a Memorandum of Understanding was signed between

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<sup>477</sup> Vieli (n 7) 126.

<sup>478</sup> Ibid 136.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

<sup>481</sup> Ibid.

<sup>482</sup> Ibid 137.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid 138.

<sup>485</sup> UEFA, ‘Players’ unions’, *UEFA.com* (Web Page, viewed 19 April 2017) <<https://www.uefa.com/insideuefa/stakeholders/players-unions/>>.

UEFA and FIFPro in which FIFPro recognised UEFA ‘as the governing body for association football at all levels’,<sup>486</sup> and UEFA recognised ‘FIFPro as the only umbrella organisation of trade unions for professional association football players in Europe’.<sup>487</sup> FIFPro was also invited to provide four representatives on the PFSC. The Memorandum of Understanding was renewed at Istanbul in 2012,<sup>488</sup> providing an appropriate avenue through which UEFA consults with the players. Its effectiveness can be gauged from the fact that the players have not raised any concerns with the FFP Regulations.

Spectators are crucial to the game because without their interest there would be no game. Nowadays, the term ‘supporters’ covers those people who attend the ‘live’ games and also those, who are not actually present at the games, but who watch matches on television or via other technological means. Both types of supporter are vital to football from a financial perspective with those attending the matches contributing towards the gate receipts and those remote supporters encouraging media companies to pay large sums for the rights to broadcast games. UEFA sees supporters as ‘the lifeblood of professional football – they are the identity of the clubs. Owners, coaches and players change, but supporters always remain.’<sup>489</sup>

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<sup>486</sup> Ibid.

<sup>487</sup> Ibid.

<sup>488</sup> Ibid.

<sup>489</sup> UEFA, ‘Supporters’, *UEFA.com* (Web Page, viewed 19 April 2017)

<<https://www.uefa.com/insideuefa/stakeholders/supporters/>>. In its Vision Europe document, UEFA considered the spectator where ‘supporter culture, which, whilst passionate, rejects violence, hatred and discrimination of all kinds, and incorporates fair play and respect for opponents and others’. See UEFA (n 246) 10. UEFA’s ideal world would be one ‘where everyone in Europe has the opportunity to watch attractive live football in safe and modern facilities in their locality or region’. See UEFA, above n 246, 9. Crowd violence was common at European football games during the 1970s with efforts to curb this seeing limited success. This came to a head in May 1985, when 39 supporters, mainly from Juventus, died as a result of crowd violence, which was made worse with the collapse of a stadium wall at Heysel. See Vieli (n 7) 39. Following the Heysel tragedy, increased efforts have been made not only to reduce crowd violence but also to improve the standard of football stadiums. Harsh sanctions are imposed on clubs by UEFA where crowd misbehaviour is shown to have occurred and the UEFA Club Licensing rules require stadiums to meet certain minimum standards before a club is able to play its matches there. *UEFA Club Licensing and Financial Fair Play Regulations Edition 2018* art 24. Art24(4) provides that the stadium(s) must fulfil the minimum requirements defined in the *UEFA Stadium Infrastructure Regulations* and be classified at least as a UEFA category 2 stadium. Similarly, efforts have been made to ensure that Europe experiences good club and international competitions. Changes were made to the club competitions with the advent of the UEFA’s Champions League in the 1990s. See Vieli (n 7) 94–96. The Europa League was rebranded in 2009. At the national level the new UEFA Nations league commenced in September 2018. See UEFA, ‘UEFA Nations League: all you need to know’, *UEFA.com* (Web Page, 26 January 2017) <<https://www.uefa.com/uefanationsleague/news/0258-0e2bb376a99e-1984c4ff291f-1000--nations-league-lowdown/>>. This new competition replaced uninspiring friendly matches with international matches of a more competitive and meaningful nature. The reason for these changes was to improve the competition structures with the ultimate aim of producing better quality football, from which supporters and all involved in European football would benefit.

Football Supporters Europe (FSE) was set up with UEFA's backing in 2009 with the aim of 'ensuring that the needs and viewpoints of supporters are taken into account in European football governance'.<sup>490</sup> FSE is an 'independent, representative and democratically organized European association of football supporters' with whom UEFA regularly communicates.<sup>491</sup> A further development from the beginning of the 2012–13 season was the need for clubs to appoint a supporter liaison officer (SLO), who must regularly attend meetings with the club's management and collaborate with the security officer on safety and security-related matters.<sup>492</sup> The idea of the appointment was to ensure that each club communicates with its supporters with the aim of reducing misunderstandings and also to obtain fan support for the work which 'clubs do across many areas (including commercial, social responsibility and safety and security)'.<sup>493</sup> UEFA appears to do as much as it can for European football supporters. Although it is conceded that some disgruntled fans from Manchester City and PSG have been involved in court proceedings with UEFA, this can perhaps be viewed as understandable given these clubs have wealthy owners and are restricted in their spending by the FFP Regulations.

The other body with which it is critical UEFA has a productive relationship is the European Commission, the body carrying out the day-to-day administrative work on behalf of the European Union. UEFA's relationship with the European Commission was difficult for a period following the *Bosman* decision<sup>494</sup> where the Court found the 'three plus two' rule to be illegal.<sup>495</sup> UEFA was disappointed with the decision because in 1978 it had reached a 'gentlemen's agreement' with the European Commission in respect of this rule. However, UEFA liaised with the European Commission to obtain its support for the FFP Regulations, with Joaquin Almunia, Vice-President and Competition Commissioner, stating in 2012 that he fully supported 'the objectives of UEFA's financial fair play rules as I believe it is essential

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<sup>490</sup> Ibid.

<sup>491</sup> Ibid. Meetings between FSE and UEFA representatives take place annually. UEFA has regularly supported the annual European Football Fans' Congress of FSE since 2008. It also supported a fan hosting seminar under the theme Football, Host Cities and Respect in Barcelona in 2010. UEFA has also supported fan embassy projects at major tournaments including the European Championships in 2012 and the #CelebrateFootball campaign under the Respect banner at the 2016 Championships.

<sup>492</sup> *UEFA Club Licensing and Financial Fair Play Regulations Edition 2015* art 35(1) and (2).

<sup>493</sup> UEFA, 'Club licensing 10 years on', *UEFA.com* (Web Page, 2015) <[https://www.uefa.com/MultimediaFiles/Download/uefaorg/FinancialFairPlay/02/32/60/65/2326065\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/uefaorg/FinancialFairPlay/02/32/60/65/2326065_DOWNLOAD.pdf)>, 41.

<sup>494</sup> *Bosman* (n 81).

<sup>495</sup> The 'three plus two' rule restricted the number of foreign players allowed to play for a club in any one game to only three foreign players plus two foreign players who had played in the country for at least five years continuously. See Lee, above n 1047, 1287.

for football clubs to have a solid financial foundation. The UEFA rules will protect the interests of individual clubs and players, as well as the football sector in Europe as a whole.’<sup>496</sup> This was followed in October 2014 with the European Commission and UEFA signing a cooperation agreement acknowledging their progress in working together and providing a road map for joint work over the next three years.<sup>497</sup> This agreement was renewed in 2018 for a further period of three years.<sup>498</sup> UEFA’s efforts to obtain the approval of the European Commission were pivotal to its success with its FFP Regulations. If the European Commission had raised concerns about them, the likelihood of other parties also raising concerns would have been far more likely.

#### 4.6 Conclusion

The significance of this chapter is that UEFA is a representative body seeking to attain unity and consensus among its stakeholders to obtain favourable outcomes for European football.

As a representative body, UEFA looks after the interests of the national football associations, which are its members. Its main aim is to promote and safeguard European football at all levels of the game. Its concerns do not focus solely on the interests of the upper levels of football, although the success of its competitions is important as they provide the income which UEFA needs to sustain European football as a whole. The history of UEFA reflects its position of placing importance on its competitions and also on its role as the leader of European football.

UEFA seeks to attain unity within European football and its organisational structure is geared to this approach, with its focus on the democratic right of its national associations to take the ultimate decisions to determine the course of European football. Its values also endorse this view with its predominant concerns being the success of its competitions (value 8) enabling it to support the lower levels of European football financially (value 5), whilst providing unity and leadership (value 3) through good governance (value 4) and integrity (value 7) to ensure

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<sup>496</sup> UEFA, ‘UEFA, European Commission issue joint statement’, *UEFA.com* (Web Page, 21 March 2012) <[https://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/58/1772158_DOWNLOAD.pdf)>.

<sup>497</sup> UEFA, ‘UEFA secures EU cooperation agreement’, *UEFA.com* (Web Page, 14 October 2014) <<https://www.uefa.com/insideuefa/stakeholders/news/021a-0f8a6cf4f8fe-eb5fccf55381-1000--uefa-secures-eu-cooperation-agreement/>>.

<sup>498</sup> UEFA, ‘UEFA and European Commission extend arrangement for cooperation’, *UEFA.com* (Web Page, 21 February 2018) <<https://www.uefa.com/insideuefa/mediaservices/news/0242-0f8e5d8d847c-85ba897a5398-1000--uefa-and-european-commission-extend-arrangement-for-cooperation/>>.

the less powerful groups within European football are recognised and respected (values 6 and 10).

The development of its relationships with stakeholders and its desire to achieve consensus amongst them also supports UEFA's concept of unity for those involved in European football. UEFA has been determined in its efforts to gain the support of all its stakeholders, internal and external. It is in this light that UEFA's introduction of the FFP Regulations should be viewed.

## CHAPTER 5: CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS (CLFFPR)

### 5.1 Introduction

In this chapter the FFP Regulations are examined, looking at why they were introduced, what restrictions they impose on clubs and what they hope to achieve. They will also be examined in the light of UEFA's objectives generally and their relationship with the Club Licensing Regulations (CLR) which came into force before the FFP Regulations. This chapter will also consider the administrative and enforcement arrangements which UEFA have in place for its Regulations as well as the rules to deal with any breaches. The purpose is to provide a clear understanding of the FFP Regulations, starting with their background, what they are, and how they operate. That understanding is critical to the balance of this thesis because the FFP Regulations are the central and key element and it is, therefore, crucial that all their aspects are fully described and considered.

### 5.2 Background to the Club Licensing and Financial Fair Play Regulations (CLFFPR)

UEFA's FFP Regulations are currently contained in the CLFFPR.<sup>499</sup> Before considering this topic in detail it is important to understand the CLFFPR's genesis. The first club licensing manual was produced in 2002 with initial licensing decisions being taken in 2004 to determine whether to grant or refuse clubs the licence necessary to participate in UEFA club competitions. These regulations, which have been periodically updated, are referred to as the CLR.

In 2009, UEFA's Executive Committee sought to 'strengthen the financial requirements of the licensing system'<sup>500</sup> and proposed the introduction of 'a financial fair play concept for the game's well-being'.<sup>501</sup> These stronger financial measures, known as the FFP Regulations, were supported by the national associations and passed by the UEFA Congress in 2010. The FFP Regulations 'are an extension of UEFA's Club Licensing Regulations and can only be properly understood in that context'.<sup>502</sup> European football clubs, which wish to play in UEFA's competitions, now have to comply with both the CLR and the FFP Regulations.

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<sup>499</sup> *UEFA Club Licensing and Financial Fair Play Regulations Edition 2018*.

<sup>500</sup> Lindholm (n 167) 192.

<sup>501</sup> UEFA, 'Protecting the game Financial Fair Play', *UEFA.com* (Web Page, 2015)

<<https://www.uefa.com/insideuefa/protecting-the-game/>>.

<sup>502</sup> Lindholm (n 167) 192.



The original CLR covered a number of licensing criteria including financial ones. When the FFP Regulations were added, the original financial criteria were enhanced in two main areas, the payment of debts provisions and the introduction of the breakeven requirement. These enhanced measures were also placed under the direct monitoring of UEFA, whilst the CLR continued to be supervised by the national associations with assistance from UEFA.

From a documentation perspective, the FFP Regulations were added to the CLR to create the CLFFPR. There are four parts to the CLFFPR:

Part I	General Provisions
Part II	UEFA Club Licensing
Part III	UEFA Club Monitoring
Part IV	Final Provisions

Part II contains the CLR and Part III contains the FFP Regulations.

The background to and the actual regulations of the CLR and the FFP Regulations are examined separately in this chapter, first the CLR and then the FFP Regulations. This will depict the link between the CLR and the FFP Regulations and show that the FFP Regulations are basically a tightening of the financial regulations contained in the CLR, introduced because the original financial regulations were not achieving the outcomes UEFA was seeking. The administrative arrangements for both the CLR and the FFP Regulations will be reviewed and the chapter will conclude with an examination of how they are enforced. When referring to both the CLR and the FFP Regulations, the acronym CLFFPR will be used.

### 5.3 Club Licensing Regulations (CLR)

The years immediately after the *Bosman* ruling<sup>503</sup> were not easy ones for UEFA. Initially, it had to abolish the three + two rule<sup>504</sup> from its club competitions to comply with the decision. It also faced serious problems ‘protecting its club competitions from the covetous desires of third parties outside the game’.<sup>505</sup> Another effect of the *Bosman* ruling was that a number of

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<sup>503</sup> *Bosman* (n 81).

<sup>504</sup> Under the three + two rule, clubs were able to field three foreign players plus two further foreign players if they had lived in the host country for five years. This rule was illegal following the *Bosman* decision as it sought to limit the movement of players within Europe.

<sup>505</sup> *Vieli* (n 7) 119. Media Partners wanted to set up a 36 club Super League, accompanied by a ‘ProCup’.

complaints were lodged with the European Commission, challenging UEFA's regulations.<sup>506</sup> UEFA felt it needed to talk to the clubs about its competitions but this caused some concerns with its members, the national associations. These difficulties only served to highlight that UEFA's organisational structures were outdated and that change was required. Vieli comments that:

In view of the complexity, specific nature and permanent relevance of issues as delicate as the integration of new associations, relations with the EU, the fight against violence and the management of competitions, it was clear that UEFA's traditional structures had become outdated and were too rigid to cope with current demands.<sup>507</sup>

This was a difficult period for UEFA as discussed in Chapter 4.5. The need for change prompted the FORCE Project which was established in 2000.<sup>508</sup> Part of the new structure included the formation of a panel of 62 clubs<sup>509</sup> which could be invited to assist the Club Competitions Committee.<sup>510</sup> But this did not prevent the creation of the G14 interest group comprising 14 major European clubs, which represented a threat to UEFA's unity.<sup>511</sup>

It was against this background of change and uncertainty that UEFA, using its increased contact with the professional leagues and clubs,<sup>512</sup> suggested the idea of clubs requiring a licence to participate in UEFA competitions. UEFA CEO Gerhard Aigner said that, at a time when football was 'facing diminishing income streams' it was 'vital' that clubs controlled their economic means.<sup>513</sup> He said of the licence system:

Such a system already exists in many European countries, and ensures that only clubs which are in an acceptable financial situation can take part in the top competitions. The idea would be to follow this example for UEFA's club competitions. At a time when these competitions tap larger and larger sums of

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<sup>506</sup> Ibid 121.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid 123.

<sup>509</sup> Ibid 124. This panel became part of the European Club Forum in 2002.

<sup>510</sup> Ibid 125.

<sup>511</sup> Ibid.

<sup>512</sup> This increased contact arose because of the need for UEFA to communicate more fully with the professional leagues and clubs as a result of the *Bosman* case.

<sup>513</sup> Gerhard Aigner, 'Club Licensing system key – Aigner', *UEFA.com* (Web Page, 27 March 2003) <[www.uefa.com](http://www.uefa.com)>.

money, it is essential to ensure that this money stays in football, and is not used to try and mop up bottomless debts.<sup>514</sup>

The events taking place when the licensing system was evolving meant that its introduction was challenging for UEFA. Aigner said that it was ‘the most important project UEFA has ever had’.<sup>515</sup> The task was immense in that ‘[t]he club licensing system aims at fixing minimum standards that had to apply to all clubs, across all UEFA member associations, irrespective of their size and degree of professionalism’.<sup>516</sup> To achieve a successful outcome there needed to be a complete change in philosophy through all the different bodies involved, namely UEFA, the national associations and ultimately the clubs themselves.<sup>517</sup> The national associations were an important piece in the jigsaw because they were expected to introduce the process in their particular countries. However, UEFA had ‘to ensure the consistent implementation of the set minimum standards in all national associations’.<sup>518</sup>

It was apparent that success would depend not only on the support of all the national associations but would also require an implementation process that was both gradual and flexible to take into account the different cultural backgrounds and administrative systems of the many countries involved. UEFA did have a groundswell of support, with a considerable number of clubs in the late 1990s requesting UEFA take action. These clubs ‘wanted some form of regulation to tackle many of the commonly cited problems that existed in European football, such as financial transparency, inadequate stadia, overdue payables, and lack of youth investment, amongst others’.<sup>519</sup> The flexibility in the implementation was achieved by making the individual associations the controllers of the licensing system in their own countries.

UEFA described the system as being:

based on a series of defined quality standards (covering the areas of sporting, infrastructure, personnel, administration, legal and financial matters) which must be fulfilled in order for a club to be admitted to any UEFA competition. The same minimum criteria apply to all clubs and national associations. The system represents

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<sup>514</sup> Vieli (n 7) 126.

<sup>515</sup> Ibid.

<sup>516</sup> Ibid.

<sup>517</sup> Ibid.

<sup>518</sup> Ibid.

<sup>519</sup> UEFA, ‘Club licensing 10 years on’, *UEFA.com* (Web Page, 2015)

<[https://de.uefa.com/MultimediaFiles/Download/uefaorg/FinancialFairPlay/02/32/60/65/2326065\\_DOWNLOAD.pdf](https://de.uefa.com/MultimediaFiles/Download/uefaorg/FinancialFairPlay/02/32/60/65/2326065_DOWNLOAD.pdf)>.

a significant step forward in improving transparency and governance of clubs and demonstrates that football can govern itself.<sup>520</sup>

The first four seasons of the licensing system showed ‘an increasing number of top-division clubs applied for the licence to enter UEFA competitions – from 584 clubs in the 2004–05 season to 655 clubs (i.e. an increase of 12%) in the 2007–08 season’.<sup>521</sup> Progress was, however, relatively slow with some clubs struggling to fulfil the infrastructure and financial criteria. UEFA stated that:

Among all the criteria to be fulfilled by clubs the most challenging are without doubt the infrastructure and financial criteria (that were not respected respectively by 65 and 60 clubs) followed then by personnel and administrative criteria (34 clubs), sporting criteria (23 clubs) and legal criteria (12 clubs).<sup>522</sup>

The success of the CLR was not immediate, but this was not surprising bearing in mind the requirement of clubs expected by the CLR. The objectives of the CLR as stated in Article 2(1) are:

- a) to further promote and continuously improve the standard of all aspects of football in Europe and to give continued priority to the training and care of young players in every club;
- b) to ensure that clubs have an adequate level of management and organisation;
- c) to adapt clubs’ sporting infrastructure to provide players, spectators and media representatives with suitable, well-equipped and safe facilities;
- d) to protect the integrity and smooth running of the UEFA club competitions;
- e) to allow the development of benchmarking for clubs in financial, sporting, legal, personnel, administrative and infrastructure-related criteria throughout Europe.<sup>523</sup>

To achieve these objectives, each club seeking a licence has to fulfil minimum sporting, infrastructure, personnel and administrative, legal and financial criteria.

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<sup>520</sup> UEFA, ‘Club licensing here to stay’, *UEFA.com* (Web Page, 22 November 2007)

<<https://www.uefa.com/insideuefa/protecting-the-game/news/01c7-0e6ebc2eadb2-6b4649aaddf7-1000--club-licensing-here-to-stay/>>.

<sup>521</sup> UEFA, ‘Club licensing here to stay’, *UEFA.com* (Web Page, 2008)

<<https://www.uefa.com/insideuefa/protecting-the-game/news/01c7-0e6ebc2eadb2-6b4649aaddf7-1000--club-licensing-here-to-stay/>>.

<sup>522</sup> *Ibid.*

<sup>523</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 2 (1).

Sporting criteria include a youth development programme,<sup>524</sup> youth teams,<sup>525</sup> medical care of players,<sup>526</sup> registration of players,<sup>527</sup> written contracts with professional players,<sup>528</sup> refereeing matters and laws of the game,<sup>529</sup> racial equality and anti-discrimination practice,<sup>530</sup> and child protection and welfare.<sup>531</sup> These criteria place the importance on player development and require clubs to have in place a written youth development program approved by its national association.<sup>532</sup> Each club must also run at least four youth teams trained by qualified coaches.<sup>533</sup>

Infrastructure criteria comprises three main spheres: a stadium for UEFA club competitions,<sup>534</sup> availability of training facilities,<sup>535</sup> and minimum infrastructure for training facilities.<sup>536</sup> These criteria require clubs to ‘have an approved stadium which fulfils the requirements of the UEFA Stadium Infrastructure Regulations and provides spectators and media representatives with a well-equipped, well-appointed, safe and comfortable environment’.<sup>537</sup> In addition, each club must have suitable training facilities, which it owns or has a contract to use,<sup>538</sup> are available throughout the year<sup>539</sup> and can be used by all its teams, including its youth teams.<sup>540</sup> The facilities must include, as a minimum, indoor and outdoor facilities, dressing rooms and a medical room.<sup>541</sup>

Personnel and administrative criteria are contained in Articles 27 to 42 providing details of the employment positions which each club must have including, general manager,<sup>542</sup> finance

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<sup>524</sup> Ibid art 17.

<sup>525</sup> Ibid art 18.

<sup>526</sup> Ibid art 19.

<sup>527</sup> Ibid art 20.

<sup>528</sup> Ibid art 21.

<sup>529</sup> Ibid art 22.

<sup>530</sup> Ibid art 23.

<sup>531</sup> Ibid art 23bis.

<sup>532</sup> UEFA (n 521) 21.

<sup>533</sup> Ibid.

<sup>534</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 24.

<sup>535</sup> Ibid art 25.

<sup>536</sup> Ibid art 26.

<sup>537</sup> UEFA (n 519) 11.

<sup>538</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 25(2).

<sup>539</sup> Ibid art 25(1).

<sup>540</sup> Ibid art 25(3).

<sup>541</sup> Ibid art 26.

<sup>542</sup> Ibid art 28.

officer,<sup>543</sup> media officer,<sup>544</sup> medical doctor,<sup>545</sup> head coach of first squad,<sup>546</sup> head of youth development programme,<sup>547</sup> and youth coaches.<sup>548</sup> Clubs must also consider security and spectators with the requirement that a qualified security officer, stewards to ensure safety at home games, a supporter liaison officer, and a disability access officer are be appointed.<sup>549</sup>

The legal criteria, contained in Articles 43 to 46,<sup>550</sup> require each club to disclose its legal structure and also provide a declaration in respect of its participation in UEFA club competitions, that ‘it recognises as legally binding the statutes, regulations, directives and decisions of FIFA, UEFA, the UEFA member association...as well as the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne as provided in the relevant articles of the UEFA Statutes’.<sup>551</sup> In particular, each club is expected to ‘abide by and observe the UEFA Club Licensing and Financial Fair Play Regulations’.<sup>552</sup>

Financial criteria, contained in Articles 46 to 52,<sup>553</sup> determine who the reporting entity is and what each reporting entity has to report on.<sup>554</sup> Financial statements need to be prepared annually.<sup>555</sup> There are also articles dealing with no overdue payables towards football clubs,<sup>556</sup> no overdue payables in respect of employees<sup>557</sup> and no overdue payables towards social/tax authorities.<sup>558</sup> The overdue payables articles provide that in each case the licence applicant (the club) must show that it does not have any overdue payables outstanding as at 31 March preceding the licence season.<sup>559</sup>

The term ‘overdue payables’ is defined generally in Annex VIII to the Regulations.<sup>560</sup> ‘Payables’ are considered as overdue if they are not paid according to the agreed terms with the creditor,<sup>561</sup> and are considered not overdue if, inter alia, the account has been paid in

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<sup>543</sup> Ibid art 29.

<sup>544</sup> Ibid art 30.

<sup>545</sup> Ibid art 31.

<sup>546</sup> Ibid art 36.

<sup>547</sup> Ibid art 38.

<sup>548</sup> Ibid art 39.

<sup>549</sup> Ibid arts 33 to 35bis.

<sup>550</sup> Ibid arts 43 to 46.

<sup>551</sup> Ibid art 43(a).

<sup>552</sup> Ibid art 43(f).

<sup>553</sup> Ibid arts 46 to 52.

<sup>554</sup> Ibid art 46bis.

<sup>555</sup> Ibid art 47.

<sup>556</sup> Ibid art 49.

<sup>557</sup> Ibid art 50.

<sup>558</sup> Ibid art 50bis.

<sup>559</sup> Ibid arts 49(1), 50(1) and 50bis(1).

<sup>560</sup> Ibid annex V111.

<sup>561</sup> Ibid annex V111(1).

full,<sup>562</sup> the creditor has agreed in writing to extend time for payment,<sup>563</sup> the account is disputed and legal proceedings have been commenced,<sup>564</sup> reasonable grounds for contesting the claim can be established<sup>565</sup> and where the creditor cannot be located, provided reasonable efforts have been taken by the club to do so.<sup>566</sup>

The term ‘payables’ is also considered in the context of each type of creditor. Payables in respect of football clubs are those amounts due ‘as a result of transfer activities, including training compensation and solidarity contributions as defined in the FIFA Regulations on the Status and Transfer of Players, as well as any amount due upon fulfilment of certain conditions’.<sup>567</sup> Payables in respect of employees and former employees includes ‘wages, salaries, image rights payments, bonuses and other benefits’ due as a result of contractual or legal obligations.<sup>568</sup> Payables due to social/tax authorities are those resulting from contractual and legal obligations in respect of a club’s employees or former employees that arose prior to the previous 31 December.<sup>569</sup>

Within seven days prior to the start of the period in which the licensing decision is to be made, each club also has to confirm that its licensing documentation is correct and that there have been no significant changes which affect the licensing criteria or its financial position.<sup>570</sup> The clubs must also provide future financial information if the auditor’s report in respect of the club’s financial statement contains a qualified comment about it being a ‘going concern’, or if the club’s financial situation reveals a deteriorating negative equity position.<sup>571</sup>

When critiquing the CLR, it is clear that UEFA spent a large amount of time trying to improve many aspects of European football. The CLR themselves are far-reaching, looking not only to cover the financial aspects, including the preparation of regular accounts and making sure that outstanding debts are paid, but also areas like infrastructure (club stadiums and training facilities), club personnel, legal requirements and sporting matters. This reveals a determination to introduce a solid basis on which clubs can exist and flourish for the ultimate benefit of European football. It also reveals the magnitude of UEFA’s aims. The extent of

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<sup>562</sup> Ibid annex V111(2)(a).

<sup>563</sup> Ibid annex V111(2)(b).

<sup>564</sup> Ibid annex V111(2)(c).

<sup>565</sup> Ibid annex V111(2)(d).

<sup>566</sup> Ibid annex V111(2)(e).

<sup>567</sup> Ibid art 49(2).

<sup>568</sup> Ibid art 50(2).

<sup>569</sup> Ibid art 50bis(1).

<sup>570</sup> Ibid art 51.

<sup>571</sup> Ibid art 52.

what it wants to attain was never going to be achieved instantly; it was always going to be a long-term project. The focus on the future is evidenced by the sporting criteria including issues of a longer-term nature such as youth development, racial equality and anti-discrimination practice. These matters were always going to be issues that would not be resolved immediately.

The other pertinent aspect that needs to be mentioned is the detail contained in the criteria. The stadium criteria, for instance, require clubs to have a category 2 stadium which means it needs floodlighting and a minimum seating capacity of 1500, a control room with good overview of the stadium and equipped with communication facilities together with media-related areas including a media working area, a main camera platform, a press box, TV and radio commentary positions, TV studios and a press conference room.<sup>572</sup> Further requirements for each of the items are contained in UEFA's *Stadium Infrastructure Regulations*, which, for example, provide precise details on the vertical and horizontal illuminance required for the floodlighting. The detail of what is required is precise and exact, covering all areas of the stadium's facilities. The large number of issues covered by the criteria and the detail provided of what was required is indicative of UEFA's effort and desire to meet its CLR aims.

#### 5.4 *Financial Fair Play (FFP) Regulations*

Despite the introduction of the CLR, in 2009 UEFA's Executive Committee stated that:

In recent seasons, many clubs have reported repeated, and worsening, financial losses. The wider economic situation has created difficult market conditions for clubs in Europe, and this can have a negative impact on revenue generation and creates additional challenges for clubs in respect of the availability of financing and day-to-day operations. Many clubs have experienced liquidity shortfalls, leading for instance to delayed payments to other clubs, employees and social/tax authorities.<sup>573</sup>

UEFA's view might seem, *prima facie*, to have been a strange one because European football had gone through a period of expansion in the early 1990s, which had largely occurred because of the greater exposure granted to the game by pay television. This created wider audiences and brought more money into the game from TV rights, providing rewards that could be high. The problem is, however, that not every team can be successful. The nature

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<sup>572</sup> *UEFA Stadium Infrastructure Regulations* (2018) Part IV Category 2 structural criteria, 9–11.

<sup>573</sup> *Ibid.*



of any sporting competition means that there is always going to be only one winner with a number of losers.<sup>574</sup> UEFA's research found that more than 50% of the 655 European football clubs had operated at a loss over the previous year. It also discovered that some clubs had large outstanding debts to creditors, including sums due to other clubs for transfer fees. It felt there was a distinct possibility of financial chaos if attempts were not made to rectify the position.<sup>575</sup>

UEFA's view on the situation was adequately recorded by its then general secretary Gianni Infantino, who emphasised the need for 'greater financial discipline',<sup>576</sup> stating that although football revenues had continued to rise to a record €11.7 billion, increased costs had created net losses of €1.2 billion, which was almost double the previous highest amount, and total transfer debts amounted to €2.2 billion, with almost €800 million not due to be paid for more than twelve months.<sup>577</sup>

In 2011, UEFA stressed that its financial fair play concept was 'crucial in helping to ensure football's long-term stability'.<sup>578</sup> Former UEFA President Michel Platini stated that:

It is a complex project, but one I consider vital for football's future. Financial fair play is not aimed at putting clubs in difficulty. On the contrary, it aims to help them exit an infernal spiral which prevents certain of them from having a viable medium-term or long-term model. Supporters and lovers of football have no interest in seeing clubs that are part of European football's heritage disappear as a result of hazardous management. It was necessary for an authority to intervene, and this is what we are doing.<sup>579</sup>

UEFA's view of the financial position is clearly evidenced by some high profile examples such as English club Portsmouth FC which went into administration,<sup>580</sup> Glasgow Rangers

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<sup>574</sup> Neil Dunbar, 'The union of European football's association's club licensing and financial fair play regulations – are they working?' (2015) *Bond University Sports Law eJournal* <<http://epublications.bond.edu.au/slej/27>>.

<sup>575</sup> Ibid.

<sup>576</sup> UEFA, 'Financial fair play ensures football's stability', *UEFA.com* (Web Page, 11 January 2011) <<https://www.uefa.com/insideuefa/protecting-the-game/news/01ed-0f86158ca3d7-227e20a44734-1000--financial-fair-play-ensures-football-s-stability/>>.

<sup>577</sup> Ibid 2.

<sup>578</sup> Ibid 1.

<sup>579</sup> Ibid 1–2.

<sup>580</sup> Dunbar (n 574) 2. Alexandre Gaydamak purchased the club in 2006 and with the aid of his funding and the astute management of Harry Redknapp, Portsmouth won the FA Cup in 2008 and also secured a top half finish in the EPL in 2007 and 2008. As a result of the GFC, Gaydamak was forced to sell the club in 2009 and from there the club's financial position declined. Portsmouth went into administration in 2010 with debts in the

which went into liquidation in October 2012,<sup>581</sup> and Valencia which suffered severe financial difficulties until rescued by Singapore businessman Peter Lim.<sup>582</sup> UEFA considered that there were significant financial issues within some European football clubs, which required attention, and saw itself as a regulator looking to impose ‘rules that will promote the financial health of the clubs’ over which it had control.<sup>583</sup> It is interesting to note that most of the clubs which suffered financial difficulties managed to survive<sup>584</sup> with Peeters and Szymanski noting that ‘of the 74 clubs, 46 (62%) were competing in their top division in 2012–13, 13 were playing in the second tier. Of the remaining 15, all but three were still competing in professional leagues.’<sup>585</sup> They added that ‘[g]iven this history the recent concern of UEFA with financial stability seems puzzling. Furthermore, bankruptcies are primarily a problem among teams in the lower tiers of European football, which would not be affected by Financial Fair Play.’<sup>586</sup>

The background to the FFP Regulations can also be seen in the wider context of the Global Financial Crisis (GFC) in 2007–08 with UEFA stating that:

The wider economic situation has created difficult market conditions for clubs in Europe. In particular, this has the potential to negatively impact revenue generation

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region of £135 million and in May of that year was relegated to the Championship competition (tier 2 level of English football). In 2012, the club was further relegated to Division 1 (third tier level) and in 2013 to Division 2 (fourth tier level) before gaining promotion to Division 1 in 2017. See also David Conn, ‘What’s gone wrong with Portsmouth? Ten reasons for the demise of the club’, *The Guardian* (online at 6 February 2010) <<https://www.theguardian.com/football/2010/feb/05/portsmouth-balram-chainrai-sacha-gaydamak>>. Also, Jim Holden, ‘Portsmouth highlight the rotten culture of football’, *The Express* (online at 25 April 2010) <[www.express.co.uk](http://www.express.co.uk)>.

<sup>581</sup> Douglas Fraser, ‘Rangers liquidation Q&N’, *BBC News* (Web Page, 12 June 2012) <<https://www.bbc.com/news/uk-scotland-glasgow-west-18418513>>. The club owed £31 million to Lloyds Bank in 2009 and were in dispute with HM Revenue and Customs in respect of an employee benefit trust scheme set up to avoid tax.<sup>581</sup> The club moved into administration in February 2012 and then into liquidation in October 2012 because HM Revenue and Customs was not prepared to support the club’s proposed voluntary arrangement.

<sup>582</sup> The Canadian Press, ‘Bank agrees to sale 70 per cent shares of Valencia to Singapore investor Peter Lim’, *TSN* (Web Page, 24 October 2014) <<https://www.tsn.ca/bank-agrees-to-sale-70-per-cent-shares-of-valencia-to-singapore-investor-lim-1.115190?tsn-amp>>. Lim acquired 70.4% of the club’s shareholding in May 2014 and reached an agreement with the club’s main creditor, Bankia, in August 2014. Not only had the club overspent on players, but it had paid £30 million in severance payments to managers, as well as beginning to build a new stadium before selling the grounds of the old stadium. See Valerie Kaplan, ‘UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications’ (2015) 29(4) *Emory International Law Review* 799, 800.

<sup>583</sup> Thomas Peeters and Stefan Szymanski, ‘Financial fair play in European football’ (2014) *Economic Policy* 343, 354.

<sup>584</sup> *Ibid* 355.

<sup>585</sup> *Ibid*.

<sup>586</sup> *Ibid*.

and create additional challenges for clubs in respect of the availability of financing, assets' investments and the assessment of going concern.<sup>587</sup>

However, although the GFC clearly affected European football, the main reason for the introduction of the new regulations was UEFA's view that:

It has a duty to acknowledge and consider the systemic environment of European club football in which individual clubs compete, in particular in respect of recent levels of inflation in the level of players' salaries and transfer fees...only a few clubs own their own infrastructure (stadium and training facilities) and in some notable recent cases stadiums are being sold to fund short term speculative spending on players. Many clubs reported repeated, and worsening, financial losses in their most recent financial statements and auditors expressed concern for the ability of 10% of top division clubs to continue as going concerns.<sup>588</sup>

Furthermore, UEFA did not act on its own volition in regard to the introduction of the FFP Regulations. Action was initially sought by some clubs and UEFA proceeded to consult with its key stakeholders before finalising the nature of the FFP Regulations.<sup>589</sup> It also ensured there would be a gradual implementation of the FFP Regulations, stating that 'phased implementation period will take place over three years, and the main component of the regulations – the 'break-even' requirement – will come into force for financial statements in the reporting period ending 2012...' <sup>590</sup> and that this would 'be assessed during the 2013–14 UEFA club competition season'.<sup>591</sup> UEFA President Michel Platini said that 'we have worked on the financial fair play concept hand-in-hand with the clubs, as our intention is not to punish them but to protect them'.<sup>592</sup> It was also made clear that 'during the implementation of the financial fair play rules, UEFA will continue to work together with clubs...' <sup>593</sup>

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<sup>587</sup> UEFA, 'The European Club Footballing Landscape Club Licensing Benchmarking Report Financial Year 2008', *UEFA.com* (Web Page, 2008) <[https://www.uefa.com/MultimediaFiles/Download/Publications/uefaorg/Publications/01/45/30/45/1453045\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/Publications/uefaorg/Publications/01/45/30/45/1453045_DOWNLOAD.pdf)>.

<sup>588</sup> *Ibid.*

<sup>589</sup> UEFA, 'Financial fair play: all you need to know', *UEFA.com* (Web Page, viewed 11 May 2017) <<https://www.uefa.com/news/0253-0d7f34cc6783-5ebf120a4764-1000--financial-fair-play-all-you-need-to-know/>>.

<sup>590</sup> UEFA (n 576) 2.

<sup>591</sup> *Ibid.*

<sup>592</sup> UEFA, 'Financial Fair Play Regulations are published', *UEFA.com* (Web Page, 24 June 2010) <<https://www.uefa.com/insideuefa/protecting-the-game/news/01e6-0e74c21eda89-e46c84144528-1000--financial-fair-play-regulations-are-published/>>.

<sup>593</sup> UEFA, 'UEFA statement on financial fair play', *UEFA.com* (Web Page, 1 February 2011) <<https://www.uefa.com/insideuefa/protecting-the-game/financial-fair-play/>>.

Subsequently, changes were announced to the FFP Regulations in or about June 2015.<sup>594</sup> These changes involved a relaxation of the breakeven requirement allowing clubs to make a short-term loss if they ‘can present a sustainable business plan and show that they will re-balance the books within a three-year period’.<sup>595</sup> The backdrop to the loosening of the rules was the success, which the FFP Regulations themselves had had, in reducing the combined losses of European football clubs by approximately 70% over the previous three year period.<sup>596</sup> Platini, noted that ‘[w]e are just evolving from a period of austerity to one where we can offer more opportunities for sustainable growth and development’.<sup>597</sup> He also added that ‘[t]he new regulations are an expansion and a strengthening of financial fair play’.<sup>598</sup>

UEFA was accused of making these changes in an effort to try to protect itself from those who argued that its FFP Regulations were anti-competitive and prevented wealthy benefactors from providing financial support to their clubs. Jean-Louis Dupont<sup>599</sup> stated that:

UEFA is simply moving from an entirely illegal rule to a rule that becomes a little bit less illegal. In competition law, any excessive restriction of the freedom of enterprise is by definition illegal. With these amendments, UEFA is therefore fully confessing that the previous version of the rule was excessive and therefore illegal under competition law.<sup>600</sup>

However, Infantino explained the changes in a different way, noting that:

[R]egular review of the UEFA Financial Fair Play regulations is vital in ensuring that they keep pace with the ever-changing football environment. Any potential changes to the existing regulations will look to encourage more growth, more competition and market stimulation while strengthening the emphasis on

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<sup>594</sup> Brian Homewood, ‘UEFA softening break-even rule to attract investors’, *Reuters* (Web Page, 29 June 2015) <<https://www.reuters.com/article/soccer-uefa-finance/uefa-softening-break-even-rule-to-attract-investors-idINKCN0P92QN20150629>>.

<sup>595</sup> Football Agents, ‘Financial Fair Play’, *LinkedIn* (Web Page, 21 September 2015) <<https://www.linkedin.com/pulse/financial-fair-play-article-football-agents-ronnie-hutcheon>>. Note the current *UEFA Club Licensing and Financial Fair Play Regulations* (2018) Annex XII (A) (4) provides that a voluntary agreement can cover several reporting periods.

<sup>596</sup> Associated Press, ‘UEFA to relax financial fair play rules’, *ESPN* (Web Page, 29 June 2015) <<https://www.espn.co.uk/football/uefa-champions-league/story/2507973/uefa-relax-financial-fair-play-rules>>.

<sup>597</sup> Homewood (n 594) 2.

<sup>598</sup> *Ibid.*

<sup>599</sup> Jean-Louis Dupont was the lawyer representing player agent Daniel Striani in his claim against UEFA.

<sup>600</sup> Frank Dalleres, ‘UEFA financial fair play rules that hit Manchester City were excessive and illegal, says lawyer’, *City AM* (Web Page, 30 June 2015) <<http://www.cityam.com>>.

controlling spending and safeguarding financial stability as our objective is and remains to ensure the sustainability of European club football.<sup>601</sup>

There is probably some truth in what Dupont suggests in that UEFA probably realised it needed to provide an avenue for owners to invest in their clubs and if it did not, there was a reasonable chance the ECJ could decide that the FFP Regulations were anti-competitive. However, UEFA was able to present the change as being a next stage in the process and to couch the voluntary agreement with financial safeguards to ensure it fitted in with its original and consistent aim of bringing financial stability to European football.

Two main areas are covered by the FFP Regulations: the breakeven requirement (Articles 58 to 64) and the enhanced no overdue payables rules (Articles 65 to 68).<sup>602</sup> The other key element of the FFP Regulations is the monitoring arrangements. Monitoring is conducted by the UEFA Club Financial Control Body (CFCB) rather than the national associations. Further monitoring only takes place in respect of those clubs that have qualified for a UEFA club competition apart from the UEFA Women's Champions League.<sup>603</sup>

The breakeven requirement is linked to four key notions: relevant income and expenses,<sup>604</sup> the monitoring period,<sup>605</sup> the breakeven result,<sup>606</sup> and acceptable deviation.<sup>607</sup> Normally a breakeven point in economics refers to a situation where costs and revenue are equal.<sup>608</sup> This is not the case with the FFP Regulations where the terms income and expenses are given limited meanings.

Relevant income and expenses are considered in Article 58 with 'relevant income and relevant expenses' being 'defined in Annex X'.<sup>609</sup> Relevant income covers gate receipts, broadcasting rights, sponsorship and advertising, commercial activities, other operating income, profit on disposal of player registrations, income from disposal of player registrations, excess proceeds

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<sup>601</sup> Ben Rumsby, 'UEFA to relax financial fair play rules that saw Manchester City fined', *The Telegraph* (online at 18 May 2015) <<https://www.telegraph.co.uk/sport/football/11613263/Uefa-to-relax-financial-fair-play-rules-that-saw-Manchester-City-fined.html>>.

<sup>602</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 57(1).

<sup>603</sup> *Ibid* art 57(1).

<sup>604</sup> *Ibid* art 58.

<sup>605</sup> *Ibid* art 59.

<sup>606</sup> *Ibid* art 60.

<sup>607</sup> *Ibid* art 61.

<sup>608</sup> Stefano Bastianon, 'The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout?' (2015) 11(1) *The Competition Law Review* 7, 13.

<sup>609</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 58(1).

on disposal of tangible fixed assets, and finance income and foreign exchange result.<sup>610</sup> Relevant expenses include cost of sales/materials, employee benefit expenses, other operating expenses, amortisation of costs of acquiring player registrations, finance costs and dividends.<sup>611</sup>

However, some items do not form part of relevant income or relevant expenses. Items not forming part of relevant income include non-monetary credits/income (e.g. goodwill and inventories), income from transactions with related parties above fair value, income from non-football operations not related to the club, income in respect of a player for whom the licensee retains the registration, and credit in respect of a reduction of liabilities arising from procedures providing protection from creditors.<sup>612</sup> Relevant expenses do not include expense transactions with related parties below fair value, expenditure on youth development activities, expenditure on community development activities, expenditure on women's football activities, non-monetary debits/charges, certain finance costs directly attributable to the construction and substantial modification of tangible fixed assets, certain costs of leasehold improvement and certain expenses of non-football operations not related to the club.<sup>613</sup> There are also some items excluded from the breakeven result whether they produce a profit or a loss and these are the disposal and depreciation/impairment of tangible fixed assets, the disposal and amortisation/impairment of intangible fixed assets other than player registrations and certain tax income/expenses.<sup>614</sup>

The monitoring period for the breakeven requirement covers three consecutive reporting periods.<sup>615</sup> UEFA acknowledges that a club's financial performance is effected by its on-field success and this is far from certain, so the breakeven requirement needs to be viewed over an extended period and not just one year. This means that a club's deficit in one year can be offset by any surpluses made in the other two years of the monitoring period.<sup>616</sup> The breakeven result is the difference between relevant income and relevant expenses for each reporting period.<sup>617</sup> If the licensee's relevant expenses are less than the relevant income for a reporting

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<sup>610</sup> Ibid annex X(A)(1). Finance is 'interest revenue arising from the use by others of entity assets yielding interest' and the foreign exchange result 'is the net of gains or losses on monetary items, whether realised or unrealised.' (See annex X(b)(i).

<sup>611</sup> Ibid annex X(A)(2).

<sup>612</sup> Ibid annex X(A)(1).

<sup>613</sup> Ibid annex X(A)(2).

<sup>614</sup> Ibid annex X(D).

<sup>615</sup> Ibid art 59(1).

<sup>616</sup> Ibid arts 59(2) and 59(3).

<sup>617</sup> Ibid art 60(1).

period then the club has a breakeven surplus.<sup>618</sup> However, if the relevant expenses are more than the relevant income there is a breakeven deficit.<sup>619</sup> Having the monitoring period run over a three year period is helpful to clubs as it provides them with the opportunity to meet the regulations over an extended period rather than having to break even every year. This gives the clubs the opportunity to financially plan if they wish and also caters for the occasional year when a club may accidentally breach the breakeven provision but still have the chance to remedy the situation in subsequent years.

Some allowances from a strict breakeven position are also made and these are contained in Article 61, which considers acceptable deviation.<sup>620</sup> The acceptable deviation is €5 million, which means that any club can have this deficit in respect of any three year monitoring period.<sup>621</sup> This amount can be exceeded by up to €30 million ‘if such excess is entirely covered by contributions from equity participants and/or related parties’.<sup>622</sup> Article 61(2) states that ‘a lower amount may be decided in due course by the UEFA Executive Committee’.<sup>623</sup> The current €30 million excess appears to be a reasonable figure and would be a sufficient amount for the majority of owners, although it is conceded that several wealthy owners would not consider the amount to be generous.

The licensee is required to lodge the breakeven information by the deadline and in the format required by UEFA.<sup>624</sup> There are six indicators of interest to UEFA. These include the breakeven result, whether the financial statements reveal the club has a deteriorating net liabilities position and whether the auditor’s report contains concerns about the club being of going concern.<sup>625</sup> When a club is in breach of the one of the indicators it is required to file projected breakeven information.<sup>626</sup> This information is basically a projected financial forecast for the next 12 months with clubs in this situation being required to lodge a budgeted profit and loss account, a projected breakeven result on the budgeted profit and loss account and including adjustments to calculate relevant income and expenses, a budgeted cash flow, a budgeted balance sheet, and explanatory notes, including assumptions that are not

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<sup>618</sup> Ibid art 60(2).

<sup>619</sup> Ibid.

<sup>620</sup> Ibid art 61.

<sup>621</sup> Ibid art 61(2).

<sup>622</sup> Ibid.

<sup>623</sup> Ibid.

<sup>624</sup> Ibid art 62(1).

<sup>625</sup> Ibid art 62(3).

<sup>626</sup> Ibid art 63(1).

unreasonable, risks and a comparison with the immediately preceding reporting period.<sup>627</sup> The breakeven requirement is fulfilled if the licensee has a breakeven surplus or an aggregate breakeven deficit within the acceptable deviation.<sup>628</sup>

As discussed earlier in this chapter, a voluntary agreement provision, relaxing the FFP Regulations, was introduced by UEFA in 2015.<sup>629</sup> Individual clubs can apply for this arrangement if they are newly licensed to play in UEFA competitions, have already qualified for a UEFA competition and fulfilled the breakeven requirement, or have been subjected to a significant change in ownership or control within the previous 12 month period.<sup>630</sup> In other words, most clubs qualify to apply. The only clubs not eligible to apply are those that are still subject to sanctions for previous breakeven requirement breaches or have already had a voluntary agreement in the last three reporting periods.<sup>631</sup>

Voluntary agreements are negotiated by clubs with UEFA on an individual basis and ultimately require the approval of the Club Financial Control Body (CFCB).<sup>632</sup> Each agreement focuses on the particular club's future reporting periods. It is possible for a club under its agreement to breach the current breakeven requirement in its future reporting periods provided it can demonstrate breakeven compliance by the end of the agreed period. For this to occur, the club has to provide extensive financial documentation including balance sheet projections, projected profit and loss accounts and future cash flow figures.<sup>633</sup> A voluntary agreement can cover several reporting periods.<sup>634</sup> The agreement must contain a series of breakeven calculations, both annual and aggregate, over the term of the agreed period to keep careful control of the financial situation from a breakeven perspective.<sup>635</sup> UEFA also requires the club's owners or shareholders to enter into a formal agreement with the club to be

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<sup>627</sup> Ibid art 63(3). Article 63(4) provides that the projected break-even information must be prepared on a consistent basis with the audited annual financial statements and follow the same accounting policies as those applied for the preparation of the annual financial statements.

<sup>628</sup> Ibid art 64(1).

<sup>629</sup> Ibid art 57(5). See also Homewood (n 594) 1.

<sup>630</sup> Ibid annex XII (A)(2). 'UEFA says financial fair play has changed to attract new investors', *The Guardian* (online at 30 June 2015) <<https://www.theguardian.com/football/2015/jun/29/uefa-financial-fair-play-investors>>.

<sup>631</sup> Ibid annex XII (A)(3).

<sup>632</sup> Ibid annex XII (A)(2)(a).

<sup>633</sup> David Swan, 'The new UEFA Financial Fair Play regulations, and how they allow Milan to spend', *AC Milan Finance* (Web Page, 6 July 2015) <<https://acmilanfinance.com/2015/07/06/the-new-uefa-financial-fair-play-regulations-and-how-they-allow-milan-to-spend/>>. See also *UEFA Club Licensing and Financial Fair Play Regulations (2018)* annex XII (B)(5).

<sup>634</sup> *UEFA Club Licensing and Financial Fair Play Regulations (2018)* annex XII (A)(4).

<sup>635</sup> Ibid annex XII (A)(5).



responsible for any breakeven deficits under the agreement.<sup>636</sup> The voluntary agreement maintains the basic concept of clubs breaking even but also gives clubs wanting to spend more than the breakeven provision the opportunity to do so provided they return to a breakeven situation after an agreed period of time.

The other main area of monitoring is overdue payables, and this covers precisely the same areas of no overdue payables to football clubs,<sup>637</sup> employees<sup>638</sup> and social/tax authorities<sup>639</sup> in the financial criteria of the CLR.<sup>640</sup> The text of these Articles for the purposes of the FFP Regulations has had the word “enhanced” added to the end of their headings because UEFA wants specifically to monitor the position of overdue payables and also reduce the time period within which clubs have to remedy the situation. Under the CLR provisions, clubs only have to reveal their overdue payables in their accounts, which are, of course, prepared in arrears. This would often mean that a club could have a 12 month period before the overdue payables were revealed and this 12 month period had the potential to be ‘extended because the club would not be in breach of the then rules unless it had not paid the debt by the time it applied for its next licence on 31 March. Thus a club potentially had up to 15 months before it needed to pay its debt’.<sup>641</sup> Articles 65, 66 and 66BIS prevent this from happening by having additional cut-off dates of 30 June and 30 September<sup>642</sup> by which the debts must be paid, and clubs are required to provide a declaration that the debts have been paid within 14 days of each cut-off date. This change to the dates seems to be a fair way to proceed and better ensures that a body or person owed money by a club will be paid in a more timely fashion.

### *5.5 The Administration of the CLR and the FFP Regulations*

Different administrative procedures determine whether clubs have reached the required standards under the CLR to be granted a licence to compete in UEFA’s competitions and whether they have met the monitoring arrangements under the FFP Regulations. UEFA’s system, therefore, operates at two levels: the licensing of the clubs and the financial monitoring of clubs which have been licensed and are competing in the UEFA

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<sup>636</sup> Ibid annex XII (B)(2)(c).

<sup>637</sup> Ibid art 65.

<sup>638</sup> Ibid art 66.

<sup>639</sup> Ibid art 66bis.

<sup>640</sup> Ibid arts 65, 66, and 66bis.

<sup>641</sup> Dunbar (n 574) 3.

<sup>642</sup> The two dates work in unison, with 30 September only being operative if there are debts outstanding on 30 June.

competitions.<sup>643</sup> The licensing of the clubs is carried out by each national association which assesses the documentation submitted by each member club in its jurisdiction, decides on whether to grant that club a licence and then informs the club and UEFA.<sup>644</sup> The national associations then verify that the conditions for granting the licence are maintained by each club during the course of the year-long licensing season.<sup>645</sup> In contrast, the monitoring arrangements, used exclusively for the FFP Regulations, are carried out by UEFA. Clubs being monitored submit their completed documentation to UEFA.<sup>646</sup>

The national association, as the licensor, governs the club licensing system<sup>647</sup> and appoints a licensing manager who is responsible for licensing administration<sup>648</sup> which operates and runs the licensing system.<sup>649</sup> There is a requirement that the licensor establishes two decision-making bodies, the First Instance Body and the Appeals Body.<sup>650</sup> These bodies must be independent of each other.<sup>651</sup> Provision is made in the regulations for the duties of each of these bodies and a minimum set of procedural rules is set out.<sup>652</sup> The First Instance Body decides on whether a licence should be granted<sup>653</sup> and the Appeals Body hears appeals and makes a final decision as to whether the licence is granted or withdrawn.<sup>654</sup> National associations are also required to set up a catalogue of sanctions<sup>655</sup> and must define the core process to be used in considering whether a licence should be granted or not.<sup>656</sup>

This core process must contain the minimum steps set out in Article 9(3):

- a) Submission of the licensing documentation to the licence applicants;
- b) Return of the licensing documentation to the licensor;
- c) Assessment of the documentation by the licensing administration;
- d) Submission of the written representation letter to the licensor;

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<sup>643</sup> Ibid 16.

<sup>644</sup> Ibid.

<sup>645</sup> Ibid.

<sup>646</sup> Ibid.

<sup>647</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (Edition 2018) art 5(1).

<sup>648</sup> Ibid art 6(1).

<sup>649</sup> Ibid art 6(2).

<sup>650</sup> Ibid art 7(1).

<sup>651</sup> Ibid.

<sup>652</sup> Ibid arts 7(2) to 7(9).

<sup>653</sup> Ibid art 7.2.

<sup>654</sup> Ibid art 7.3.

<sup>655</sup> Ibid art 8.

<sup>656</sup> Ibid art 9.

e) Assessment and decision by the decision-making bodies;

f) Submission of the list of licensing decisions to the UEFA administration.<sup>657</sup>

Assessment procedures also need to be defined<sup>658</sup> and, in the case of financial criteria, specific assessment processes contained in Annex IX must be followed.<sup>659</sup> Finally, the licensor needs to ensure that all applicants are treated equally and that all information supplied by applicants in support of their applications is given full confidentiality.<sup>660</sup>

UEFA has also set up strict measures to ensure that its minimum standards are assessed accurately and effectively. These measures are contained in the Club Licensing Quality Standard (CLQS) (Edition 2012).<sup>661</sup> It is specifically stated in Article 9(1), for instance, that the process must be certified against the CLQS on an annual basis by an independent body approved by UEFA.<sup>662</sup>

Although the national associations are in control of the licensing procedure, UEFA is an advisor and sponsor, providing the licensors ‘with technical and advisory support and financial assistance’.<sup>663</sup> UEFA has a team which provides assistance to the national associations in the form of training and education, producing guidance documents and various IT tools, benchmarking and organising assistance visits and meetings with clubs and stakeholders.<sup>664</sup> The UEFA Executive Committee also plays a supervisory role in respect of matters relating to the regulations and is assisted by the Club Licensing Committee.<sup>665</sup> UEFA also provides incentive payments up to a maximum of €250,000 per member association for implementing and applying the regulations. It also acts as a guardian, ensuring ‘the consistent and correct application of the system across all member associations’,<sup>666</sup> indirectly through its carefully constructed compliance system.<sup>667</sup>

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<sup>657</sup> Ibid art 9(3).

<sup>658</sup> Ibid art 10.

<sup>659</sup> Ibid.

<sup>660</sup> Ibid art 11.

<sup>661</sup> Ibid art 9(1).

<sup>662</sup> Ibid.

<sup>663</sup> Ibid.

<sup>664</sup> UEFA (n 519) 23.

<sup>665</sup> UEFA (n 521) 40.

<sup>666</sup> Ibid 24. The €250,000 is made up of a fixed €130,000 with a potential additional maximum of €120,000 if the following conditions are satisfied: €40,000 for being certified against the Club Licensing Quality Standard; €40,000 for applying the club licensing system for participation in the domestic championship; and €40,000 for actively and satisfactorily participating in benchmarking surveys.

<sup>667</sup> UEFA also has enforcement mechanisms in place, but these have not been considered in detail here. The four organs of justice, namely the Control, Ethics and Disciplinary Body (CEDB); the Appeals Body; the

The way in which the administrative system is set up, however, does have the potential to cause problems. Having two bodies (UEFA and the national association in each country) running the system could lead to matters being overlooked, with one party under the misunderstanding that a particular issue was being dealt with by the other. There is also a potential issue with UEFA requiring consistency in the operation of its system but passing control over it to each national association to operate in its own country, leaving the possibility of inconsistencies arising. Having said this, UEFA does not have the administrative personnel to run the system for each national association and, in any event, UEFA has always wanted the national associations to act with some autonomy. However, with the arrangements as they are, it is crucial that the administrative system has a clear structure and that the processes are both recorded in writing and transparent. UEFA appears to have achieved this especially as the process of each national association has to be certified against the CLQS on a yearly basis. Further, UEFA also provides guidance, financial assistance and a compliance system to each national association which helps in ensuring consistency in the operation of the licensing system.

For the purpose of monitoring the FFP Regulations, UEFA takes a more direct approach, carrying out its auditing through its CFCB. In this process, the national associations act more as agents for UEFA, collecting information from the clubs and providing it to UEFA to assess. Article 54 contains details of the monitoring process. It consists of the following minimum steps:

- a) issuing of the requirements for monitoring documentation to the licensor and licensee;
- b) return of the required completed monitoring documentation by the licensee to the licensor;
- c) assessment and confirmation of the completeness of each licensee's documentation by the licensor;
- d) submission of the validated documentation by the licensor to the UEFA administration;

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Ethics and Disciplinary Inspectors (EDIs); and the Club Financial Control Body (CFCB) are considered in Chapter 5.6.

- e) assessment of the documentation by the UEFA CFCB;
- f) if appropriate, requests for additional information by the UEFA administration or UEFA CFCB;
- g) decision by the UEFA CFCB as specified in the relevant provisions of the Procedural rules governing the UEFA CFCB.<sup>668</sup>

The requirements imposed on the parties are also set out, with the national associations' responsibilities detailed in Article 55. It requires them to:

- a) communicate the deadlines of the monitoring process to the licensee;
- b) cooperate with the UEFA CFCB in respect of its requests and enquiries;
- c) as a minimum, assess the monitoring documentation in accordance with Annex IX;
- d) assess and confirm to the UEFA CFCB that the selected reporting perimeter is the same as used for the fulfilment of the club licensing criteria and is appropriate for club monitoring purposes;
- e) inform the CFCB of any relevant information submitted by the licensee in respect of club monitoring requirements and any event occurring after the licensing decision that constitutes a significant change to the information previously submitted by the licensee.<sup>669</sup>

The responsibilities of the licensees (the clubs) are similar for both the licensing procedure and the FFP Regulations, with the common requirement to disclose all necessary documentation to the licensor to demonstrate that the licensing obligations have been fulfilled and also any other document relevant for the licensor's decision-making.<sup>670</sup> The licensee is also expected to inform the licensor of any changes to its position following submission of the licensing documentation<sup>671</sup> as well as to display cooperation to the licensor and, in the case of

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<sup>668</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (Edition 2018) art 54(2).

<sup>669</sup> *Ibid* art 55(1).

<sup>670</sup> *Ibid* art 13(1).

<sup>671</sup> *Ibid* art 13(3).

the FFP Regulations also to the CFCB,<sup>672</sup> and confirm that the submitted documentation is complete and accurate.<sup>673</sup>

The monitoring of the FFP Regulations is, in effect, an extension of the administrative procedure already in place for the CLR and its success is determined by the efficiency and effectiveness of the process. UEFA clearly sets out what the process is and what role each party has in it, providing every opportunity for the system to work satisfactorily. Its success is illustrated by the fact that apparently no difficulties in regard to its operation have arisen.

### *5.6 The Enforcement of the CLR and the FFP Regulations*

The main enforcement bodies are the Control, Ethics and Disciplinary Body (CEDB) which deals with the CLR, and the CFCB which looks after the FFP Regulations.<sup>674</sup> The Disciplinary Regulations (DR) provide the legal rules for the CLR and the Procedural Rules (PR) governing the CFCB contain the legal provisions for the FFP Regulations.<sup>675</sup> The CLR and the FFP Regulations are, therefore, enforced separately.

Article 2 of the DR states that:

The regulations apply to any breach of UEFA's Statutes, regulations, directives and decisions with the exception of any breach of the UEFA Club Licensing and Financial Fair Play Regulations which may be penalized by the Club Financial Control Body in accordance with the Procedural rules governing the UEFA Club Financial Control Body.<sup>676</sup>

The DR also make it clear that where a case appears to come under the jurisdiction of both bodies (the CEDB and the CFCB), the chairpersons of the two bodies should decide which body deals with the case but, if they cannot reach agreement, the chair of the Appeals Body of the CEDB makes the decision.<sup>677</sup> Having two separate enforcement bodies could cause difficulties in regard to jurisdiction but it appears that UEFA has set up an appropriate procedure for determination with no issues apparent to date.

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<sup>672</sup> Ibid art 56(a).

<sup>673</sup> Ibid art 56(c).

<sup>674</sup> *UEFA Statutes* (Edition 2020) arts 32(1).

<sup>675</sup> *UEFA Disciplinary Regulations* (Edition 2020) and *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) <[www.uefa.org](http://www.uefa.org)>.

<sup>676</sup> *UEFA Disciplinary Regulations* (Edition 2020) art 2(1).

<sup>677</sup> Ibid art 2(2). The regulations also make it clear that decisions on jurisdiction can only be appealed against in combination with an appeal against the final decision of the body which heard the case.

The two bodies have clear areas of jurisdiction. The CEDB deals with matters including match-fixing,<sup>678</sup> doping,<sup>679</sup> racism,<sup>680</sup> misconduct of players and officials<sup>681</sup> and misbehaviour at UEFA matches.<sup>682</sup> Ethical provisions were added in 2017 with Article 17 dealing with the scope and general principles of ethical behaviour.<sup>683</sup> Particular areas are subsequently covered, including use of confidential information and abuse of position,<sup>684</sup> conflicts of interest,<sup>685</sup> offering and accepting gifts and other benefits,<sup>686</sup> bribery and corruption,<sup>687</sup> and bidding and votes.<sup>688</sup> The CFCB, on the other hand, is the sole body with the power to determine if a club has breached the FFP Regulations,<sup>689</sup> although it is also competent to determine whether licensors have fulfilled their licence obligations, generally, in respect of the regulations.<sup>690</sup>

The legal requirements for both bodies contain a number of similarities including the important aspect of independence. Article 32 makes it clear that members of the organs of justice are independent and cannot belong to any other organ or committee of UEFA.<sup>691</sup> Members of the CEDB and the Appeals Body and the Ethical and Disciplinary Inspectors (EDIs) are elected by the Executive Committee (from nominations proposed by the member associations) for a term of four years. Members of the CFCB are also elected by the Executive Committee for a term of four years.<sup>692</sup> All elected members have to be ratified by Congress.<sup>693</sup> The make-up of the two bodies is basically the same with the CEDB consisting of a chairman, two vice-chairmen and seven other members<sup>694</sup> with Article 34ter providing that the CFCB is made up of a chairman, two vice-chairmen and a necessary number of members as decided by the Executive Committee.<sup>695</sup> The need for independence is crucial in this situation where a perception could arise that the enforcement bodies are part of UEFA, particularly as UEFA set up the bodies. It is prudent for UEFA to ensure that closer examination of the actual

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<sup>678</sup> Ibid art 12.

<sup>679</sup> Ibid art 13.

<sup>680</sup> Ibid art 14.

<sup>681</sup> Ibid art 15.

<sup>682</sup> Ibid art 16.

<sup>683</sup> Ibid art 17.

<sup>684</sup> Ibid art 18.

<sup>685</sup> Ibid art 19.

<sup>686</sup> Ibid art 20.

<sup>687</sup> Ibid art 21.

<sup>688</sup> Ibid art 22.

<sup>689</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 3(1)(c)

<sup>690</sup> Ibid art 3(1).

<sup>691</sup> *UEFA Statutes* (Edition 2020) arts 32(1).

<sup>692</sup> Ibid art 32(2).

<sup>693</sup> Ibid art 32(2).

<sup>694</sup> Ibid art 33(1).

<sup>695</sup> Ibid art 34ter(1).

situation reveals a total separation between its judicial arm and its legislative and administrative arms.

There are other similarities between the two bodies in the areas of recusal,<sup>696</sup> confidentiality<sup>697</sup> and appeal to CAS,<sup>698</sup> although the issues of standard of proof,<sup>699</sup> evidence,<sup>700</sup> representation<sup>701</sup> and recidivism<sup>702</sup> are specifically dealt with in the DR but are not referred to in the PR. Hearings are generally conducted in person in the CEDB<sup>703</sup> with appeal hearings before the Appeals Body being conducted either orally or in person,<sup>704</sup> whereas, in the CFCB, written observations are submitted,<sup>705</sup> with the CFCB chairman convening an oral hearing, either on his own initiative or at the request of the defendant.<sup>706</sup> UEFA has the power to enforce the decisions of both bodies.<sup>707</sup> UEFA would be advised to specifically deal with issues like burden of proof in its PR as it is clearer for parties involved in proceedings before the CFCB if each rule is individually set out rather than a generic reference used. Currently Article 26 simply provides, under the heading ‘Applicable rules’, that ‘[i]n rendering its final decision the adjudicatory chamber applies the UEFA Statutes, rules and regulations and, in addition, Swiss law’.

The bodies operate slightly differently with the CEDB following a common law approach and the CFCB taking more of a civil law system stance. The CEDB system has an initial hearing with the right to refer the matter to an Appeal Body. Proceedings can be commenced in the CEDB in the following way:

- (a) on the basis of official reports;
- (b) where a protest has been lodged;<sup>708</sup>

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<sup>696</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 9 and *Disciplinary Regulations* (Edition 2020) art 33.

<sup>697</sup> *Ibid* art 10 and *Disciplinary Regulations* (Edition 2020) art 25.

<sup>698</sup> *Ibid* art 34 and *Disciplinary Regulations* (Edition 2020) art 65(6).

<sup>699</sup> *Disciplinary Regulations* (Edition 2020) art 24(2).

<sup>700</sup> *Ibid* art 24(1) and art 44.

<sup>701</sup> *Ibid* art 38.

<sup>702</sup> *Ibid* art 25.

<sup>703</sup> *Ibid* art 41.

<sup>704</sup> *Ibid* art 64(1).

<sup>705</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 20.

<sup>706</sup> *Ibid* art 21.

<sup>707</sup> *Ibid* art 35 and *Disciplinary Regulations* (Edition 2020) art 66.

<sup>708</sup> Members associations and their clubs are entitled to lodge protests. Protests must reach the CEDB in writing, indicating the relevant grounds, within 24 hours of the end of the match in question. See *Disciplinary Regulations* (Edition 2020) art 56.1.



- (c) at the request of the UEFA Executive Committee, the UEFA president or the UEFA general secretary;
- (d) at the request of an EDI;
- (e) on the basis of documents received from a public authority;
- (f) where a complaint has been filed, subject to prior approval of an EDI.<sup>709</sup>

The EDIs are part of the CEDB process and are appointed by the Executive Committee.<sup>710</sup> They represent UEFA before the CEDB and the Appeals Body.<sup>711</sup> An EDI may initiate investigations, propose standard disciplinary measures to be imposed on parties, lodge appeals against decisions of the CEDB and support UEFA should a party lodge an appeal against a decision by the Appeals Body with CAS.<sup>712</sup> Appeals to the Appeals Body can be made by parties directly affected by a decision and the EDI.<sup>713</sup>

The CFCB is arranged differently and is divided into an investigatory chamber and an adjudicatory chamber.<sup>714</sup> The investigatory chamber comprises a chief investigator and at least three other members.<sup>715</sup> Whereas, the adjudicatory chamber comprises the chairman of the body, who also heads this chamber, and at least three other members, including two vice-chairmen.<sup>716</sup> All members are assigned to either the investigatory chamber or the adjudicatory chamber.<sup>717</sup> Members of one chamber cannot simultaneously be members of the other chamber.<sup>718</sup>

The decision-making process begins with the chief investigator commencing the investigation.<sup>719</sup> The chief investigator collects the evidence in whatever form he or she deems appropriate<sup>720</sup> with the defendant having the right to consult the case file.<sup>721</sup> Upon completion of the investigation, the chief investigator can either dismiss the case, conclude a settlement

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<sup>709</sup> *Disciplinary Regulations* (Edition 2020) art 55(1).

<sup>710</sup> *Ibid* art 34bis(1).

<sup>711</sup> *Ibid* art 34bis(2).

<sup>712</sup> *Ibid* art 31(3).

<sup>713</sup> *Ibid* art 60.

<sup>714</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 4(2).

<sup>715</sup> *Ibid* art 4(3).

<sup>716</sup> *Ibid* art 4(4).

<sup>717</sup> *Ibid* art 5(1).

<sup>718</sup> *Ibid* art 4(7).

<sup>719</sup> *Ibid* art 12.

<sup>720</sup> *Ibid* art 13(2).

<sup>721</sup> *Ibid* art 13(3).

agreement with the defendant,<sup>722</sup> apply, with the consent of the defendant, disciplinary measures, or refer the case to the adjudicatory chamber.<sup>723</sup> The decision of the chief investigator can be reviewed by the adjudicatory chamber,<sup>724</sup> although the adjudicatory chamber can only review decisions in regard to the existence of a manifest error of assessment.<sup>725</sup> The adjudicatory chamber may uphold, reject, or modify the decision or refer the case back to the chief investigator.<sup>726</sup>

If the matter is referred to the adjudicatory chamber, the chief investigator must prepare a file containing a concise summary of the facts, an outline of the evidence, a description of the alleged breach(es), a reference to the provision(s) alleged to have been breached; a proposal regarding the final decision to be taken, including, where appropriate, any disciplinary measures.<sup>727</sup> A reporting investigator from among the members of the adjudicatory chamber presents the case to the adjudicatory chamber for decision.<sup>728</sup> The adjudicatory chamber has several different final decisions it can make. It can dismiss the case, accept or reject the club's admission to the UEFA club competition in question, impose disciplinary measures, or uphold, reject or modify the decision of the chief investigator.<sup>729</sup>

Although the two bodies use slightly different procedures, the practical differences are relatively minor. The EDI acts as a prosecutor before the CEDB, while the chief investigator has the opportunity to play a more adjudicative role in the CFCB if the defendant agrees. Both procedures would seem capable of working satisfactorily and any concern about the chief investigator having too much power is offset by the knowledge that if the defendant is not content with the chief investigator's determinations, the matter is referred to the adjudicatory chamber. Notwithstanding this, one procedural problem that became apparent in cases brought by UEFA against Galatasary and PSG was the

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<sup>722</sup> Settlement agreements may be deemed appropriate in circumstances which justify the conclusion of an effective, equitable and dissuasive settlement without referring the case to the adjudicatory chamber. See *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 15(1). Settlement agreements may set out the obligation(s) to be fulfilled by the defendant. See *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 15(2).

<sup>723</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 14(1).

<sup>724</sup> *Ibid* arts 16(1) and 16(2).

<sup>725</sup> *Ibid* art 16(3).

<sup>726</sup> *Ibid* art 16(4).

<sup>727</sup> *Ibid* art 17(1).

<sup>728</sup> *Ibid* art 18(1).

<sup>729</sup> *Ibid* art 27.

adjudicatory chamber of the CFCB taking too long to review the decision of the chief investigator. In both cases, CAS determined that since the adjudicatory chamber had taken longer than the ten days prescribed in Article 16, UEFA was denied the opportunity to proceed with the matter further. UEFA's reaction to the decisions was to amend the rule to provide the adjudicatory body 30 days to determine whether or not to conduct a review.

One final issue regards sanctions. There is little advice provided to the CFCB as to what punishments should be imposed for breaches of the FFP Regulations. All that is provided is a list of the types of sanctions that could be imposed, together with a series of general factors that the CFCB may take into account when considering the monitoring requirements. These factors include the quantum and trend of the breakeven result; the projected aggregated breakeven result; the impact of conversion of accounts in local reporting currency into euros; the debt situation; force majeure; major and unforeseen changes in the economic environment; operating in a structurally inefficient market; and squad size limit.<sup>730</sup> Although this issue was not specifically highlighted in UEFA's matter before CAS against AC Milan, it was decided that the sanction imposed on AC Milan of a one season ban from UEFA's competitions was not proportionate and CAS referred the matter back to the CFCB to determine a more proportionate penalty. This issue of sanctions will be given more consideration in Chapter 7.

## 5.7 Conclusion

As stated in the introduction, an understanding of the FFP Regulations is critical to the balance of this thesis because they are the central and key element and it is, therefore, crucial that all their aspects are fully described and considered. The FFP Regulations were introduced because of UEFA's concerns over the poor financial position in which some European football clubs found themselves. This step was not a sudden or reactive decision as UEFA already had financial criteria in place under its CLR, but these were not working effectively and needed to be strengthened. Before being introduced, the FFP Regulations were considered and accepted by stakeholders, and clubs were provided with a gradual implementation of the regulations to allow clubs to become conversant with them. UEFA's introduction of the FFP Regulations was consistent and reasonable and carried out in accordance with their objectives and values to promote the welfare of European football. The administrative arrangements for the FFP Regulations are slightly different from those relating to the CLR, with the CFCB monitoring the FFP Regulations because of the need for independent and tighter control to

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<sup>730</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 68 and annex 11.

ensure the FFP Regulations are met. The FFP Regulations potentially have a greater impact on clubs than the CLR and, because of this, it is essential that they are administered fairly and correctly. From an enforcement perspective, different bodies deal with the CLR and the FFP Regulations and although these bodies function in slightly different ways, the basic premise of their independence of UEFA is maintained and the ultimate right of appeal to CAS exists in both instances.

The FFP Regulations are straightforward in their approach, requiring clubs to spend no more than they earn from football related matters and to pay their debts within a reasonable time period. The simplicity of the FFP Regulations is important when one considers that UEFA had to introduce rules to cover a number of clubs in 55 different countries. The FFP Regulations needed to follow simple accounting procedures if there were to be a uniformly applied to European football. This was of major significance from an implementation perspective because other types of financial restraints such as a salary cap or luxury tax require a more tailored approach to their introduction, taking into account the financial positions of the clubs in a particular competition, if they are to be effective. Having different implementation rules for regulations could lead to disagreements and suggestions of unfair treatment. The FFP Regulations do not have this potential issue as their application is the same for all European football clubs, irrespective in what league or country they play.

## CHAPTER 6: EUROPEAN COMPETITION LAW AND THE FINANCIAL FAIR PLAY (FFP) REGULATIONS

### 6.1 Introduction

This chapter considers European Competition Law (ECL) and, in particular, the impact of Articles 45, 101 and 102 of the *Treaty on the Functioning of the European Union* ('TFEU') on the FFP Regulations. Article 45 deals with the freedom of movement of workers, with Articles 101 and 102 dealing with the rules on competition. Article 101 prohibits agreements that have the object or effect of preventing, restricting or distorting competition, whereas Article 102 covers competition abuses carried out by dominant undertakings. The validity of the FFP Regulations has not been considered by the ECJ but it is appropriate to give consideration to their legal position because, if they were to be held illegal, then either UEFA would have to find a different method of regulation, financial or otherwise, which does comply with the ECL or, alternatively, proceed without any regulation at all. To assist in obtaining a clear understanding of the ECL, the views of commentators who have studied the validity of the FFP Regulations in relation to the ECL will be examined. However, a final discussion of the impact of ECL on the FFP Regulations will be left until answers to the thesis questions on ECL are provided in Chapters 8 and 9.

### 6.2 The European Union and Sport

The *Treaty of Rome* (1957)<sup>731</sup> did not include any reference to sport so the ECJ had to determine how sport was to be considered. In *Walrave and Koch v Union Cycliste Internationale* ('*Walrave and Koch*'),<sup>732</sup> the ECJ decided that the practice of sport was subject to ECL only in so far as it constitutes an economic activity within the meaning of Article 2 of the *TFEU*.<sup>733</sup> It concluded that discrimination based on nationality was prohibited in the sphere of economic activities but it did not affect the composition of sports teams, particularly national teams, the formation of which was a question of purely sporting interest and, as such, had nothing to do with economic activity.<sup>734</sup> This decision was confirmed in *Gaetano Dona*

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<sup>731</sup> The *Treaty of Rome* is officially known as the *Treaty establishing the European Economic Community* ('*TEEC*') and was signed on 25 March 1957 and came into force on 1 January 1958. The treaty's name has been amended on several occasions. The Treaty of Maastricht in 1992 removed the word 'economic' from its title, and, following the Treaty of Lisbon in 2009, it became known as the *Treaty on the functioning of the European Union* ('*TFEU*').

<sup>732</sup> Case 36/74, *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405 ('*Walrave and Koch*').

<sup>733</sup> *Ibid.*

<sup>734</sup> *Ibid.*

*v Maria Mantero* ('Dona'), when the ECJ confirmed nationals of other member states could not be excluded from semi-professional sports activities only on the basis of their nationality.<sup>735</sup> In *Bosman*,<sup>736</sup> the ECJ followed a similar line of reasoning maintaining that sport was subject to European Law if it constituted economic activity and holding that the football transfer rules did not comply with Article 45 of the *TFEU*, which deals with the free movement of workers.<sup>737</sup> Further confirmation of the ECJ's position in regard to sport occurred in *Meca-Medina and Majcen v Commission* ('*Meca-Medina*') in 2004<sup>738</sup> where the Court considered for the first time Articles 101 and 102 of the *TFEU*. Although the Court did not interfere with CAS's decision, it did hold that doping rules were within its province as the penal nature of the rules and the severity of penalties meant that they were capable of being an economic activity and having an adverse effect on competition.<sup>739</sup>

Since 1957, the various European institutions of the European Union have also reviewed the position of sport. At the request of the European Council, the European Commission was requested 'to submit a report to the Helsinki European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework'.<sup>740</sup> The European Council noted the Commission's report at its Nice meeting in December 2000, declaring that the specific characteristics of sport and its social function in Europe should be taken into account when implementing policies.<sup>741</sup> In 2007, the European Commission produced a White Paper on Sport, which, for the first time, discussed the term 'specificity of sport' but only after the emphatic statement that 'sport activity is subject to

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<sup>735</sup> Case 13/76 *Gaetano Dona v Maria Mantero* [1976] ECR 01333 ('*Dona*'). A president of an Italian football club asked Mr Dona to look for foreign players to play in Italy. Mr Dona incurred advertising costs seeking players from Belgium. Then, the president refused to pay Mr Dona on the basis that he had wrongly instructed Mr Dona to seek non-Italian players as the Italian football federation rules stipulated that only players of Italian nationality could play in the Italian leagues. The matter was referred to the European Court of Justice for a preliminary ruling.

<sup>736</sup> *Bosman* (n 81).

<sup>737</sup> *Ibid.*

<sup>738</sup> Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291 ('*Meca-Medina*'). David Meca-Medina and Igor Majcen were international swimmers who were each banned for four years for taking drugs. They referred their case to the European Court of Justice. At first instance, the Court held the matters to be sporting issues and not economic activities. This decision was overruled on appeal. Although the Appeal Court affirmed the Court of Arbitration's ban, it held that the doping rules were not outside the scope of European law as they had potential economic effects and needed to be proportionate.

<sup>739</sup> *Ibid.*

<sup>740</sup> Commission of the European Communities, *Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework – The Helsinki Report on Sport* (10 December 1999) 3 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF>>.

<sup>741</sup> European Council, *Conclusions of the Presidency (Annexes)* (7–10 December 2000) 17–19 <[https://www.europarl.europa.eu/summits/nice1\\_en.htm](https://www.europarl.europa.eu/summits/nice1_en.htm)>.

the application of EU law' had been made.<sup>742</sup> The White Paper on Sport led to the inclusion of Article 165(1) in the *TFEU*<sup>743</sup> in which the European Union agreed, *inter alia*, to 'contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function'.<sup>744</sup>

Thus, the position of the European Community towards sport has not changed greatly since the European Union commenced in 1957. The specificity of sport has been recognised in the Treaty of Lisbon, but sport remains subject to European law.

Therefore, there are areas of ECL that apply to sports law. They include articles 101<sup>745</sup> and 102<sup>746</sup> of the *TFEU*, which consider anti-competitive practice, and article 45 of the *TFEU*,<sup>747</sup> which considers the free movement of workers.<sup>748</sup> They are examined below in the context of their impact on the FFP Regulations.

### 6.3 Article 101 of the Treaty on the Functioning of the European Union (TFEU)

Article 101 of the *TFEU* prohibits bodies from making agreements, coming to decisions or undertaking practices that affect or disrupt the operation of free competition in the European Union's internal market. The Article states:

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical development, or investment;

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<sup>742</sup> European Commission, *White Paper on Sport* (11 July 2007) 6  
<<https://publications.parliament.uk/pa/cm200708/cmselect/cmcomeds/347/347.pdf>>.

<sup>743</sup> Article 165 was added to the *TFEU* at the Treaty of Lisbon in 2009.

<sup>744</sup> *TFEU* art 165.

<sup>745</sup> Formerly *TEEC* article 81.

<sup>746</sup> Formerly *TEEC* article 82.

<sup>747</sup> Formerly *TEEC* article 39.

<sup>748</sup> The term 'worker' is considered in 6.9.

- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers<sup>749</sup> a fair share of the resulting benefit, and which does not:

- a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101(1) prohibits agreements between two or more independent persons or bodies operating in the marketplace, which restrict competition.<sup>750</sup> It covers both vertical and

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<sup>749</sup> 'Consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. See *Directive 2011/83/EU of the European Parliament and of the Council* [2011] OJ L 304/64 art 2(1)

<https://eur-lex.europa.eu/legalcontent/EN/TXT?uri=celex%3A32011L0083>

The wide definition of 'consumer' means that the term will apply to those who watch European football.

<sup>750</sup> European Commission, 'Antitrust Overview' (Web Page, viewed 30 May 2017)

<[https://ec.europa.eu/competition/antitrust/overview\\_en.html](https://ec.europa.eu/competition/antitrust/overview_en.html)>.



horizontal agreements.<sup>751</sup> Vertical agreements occur where businesses are working at different levels with an example being a manufacturer and a distributor.<sup>752</sup> Horizontal agreements arise where actual or potential competitors operate at the same level of the supply chain.<sup>753</sup> A horizontal agreement can also exist between non-competitors, where two bodies are ‘active in the same product markets but active in different geographic markets without being potential competitors’.<sup>754</sup>

Article 101 acknowledges that there can be both advantages and disadvantages to vertical and horizontal agreements and the article ‘provides the legal framework for a balanced assessment taking into account both restrictive effects on competition as well as pro-competitive effects’.<sup>755</sup> The assessment consists of two parts.<sup>756</sup> First, under Article 101(1) there is an assessment to determine whether an agreement between undertakings has an anti-competitive objective or an actual or potential restrictive effect on competition.<sup>757</sup> If, Article 101(1) is found to be breached, Article 101(3) is invoked to establish whether any pro-competitive benefits are produced which outweigh the restrictions prohibited by Article 101(1).<sup>758</sup> In cases where Article 101(3) applies, Article 101(1) is declared inapplicable. If, however, Article 101(3) does not apply, an agreement or decision in breach of Article 101(1) is declared void by virtue of Article 101(2).<sup>759</sup>

Article 101(1) provides examples of what would be prohibited. Examples include where bodies seek to ‘directly or indirectly fix purchase or selling prices or any other trading conditions’ or ‘limit or control production, markets, technical development, or investment’. When one considers the FFP Regulations and, in particular, the use of the breakeven provision, it is possible to see that this tool could affect competition and be in breach of Article 101. By forcing clubs to break even, UEFA appears to be restricting clubs’ expenditure on

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<sup>751</sup> Ibid. From a team sports perspective, a vertical agreement would arise if a body supervising a sport entered into an agreement with one of the clubs it supervised. In other words, if one body is at a higher level than the other (the club) it would be a vertical agreement. A horizontal agreement would arise if a club entered into an agreement with another club as the clubs are on the same level. The relationship between UEFA and its national associations will be considered later in this chapter.

<sup>752</sup> Ibid.

<sup>753</sup> Ibid.

<sup>754</sup> *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ C 11 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29>>.

<sup>755</sup> Ibid para 4.

<sup>756</sup> Ibid para 20.

<sup>757</sup> Ibid.

<sup>758</sup> Ibid.

<sup>759</sup> Ibid.

buying players and also the salaries that the clubs can afford to pay their players. Similarly, by expecting clubs to only spend what they earn, UEFA is potentially preventing investment from a third party source, denying that potential third party from investing in a club to cover its additional expenditure. Commentators who have written on the FFP Regulations have all been of the opinion that they breach Article 101(1).<sup>760</sup>

There are three elements to Article 101(1) which need to be established. First, there needs to be an agreement or a decision made between the undertakings.<sup>761</sup> Secondly, the agreement or decision must affect or have the potential to affect trade between member states.<sup>762</sup> Thirdly, the agreement or decision must have the object or effect of restricting competition within the internal market. The third element means that even if an agreement does not affect competition, but its object was to do so, it would be prohibited.<sup>763</sup> Likewise, if an innocently made agreement restricts competition, it too would be prohibited.<sup>764</sup> The question, therefore, is whether those three elements of Article 101 all apply to the FFP Regulations.

First, Article 101(1) only applies to an agreement between undertakings or a decision by an association of undertakings. If UEFA was held to be an individual undertaking then, since it has not reached an agreement with another undertaking, the Article would not apply. However, it is more likely that UEFA would be treated as an association of undertakings making a decision to implement the FFP Regulations. This would follow the ruling in *Piau v Commission of the European Communities* ('Piau'),<sup>765</sup> where 'the General Court classified FIFA as an association of undertakings when a challenge was made to their player

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<sup>760</sup> See, eg, Lindholm (n 167). See also Valerie Kaplan, 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications' (2015) 29(4) *Emory International Law Review* 799, 857. See also Tom Serby, 'The state of EU sports law: lessons from UEFA's "Financial Fair Play" regulations' (2016) 16 *International Sports Law Journal* 37, 45.

<sup>760</sup> Stefan Szymanski, 'Fair is Foul: A Critical Analysis of UEFA Financial Fair Play' (2014) 9 *International Journal of Sport Finance* 218, 227. Thomas James Jemson, 'For the Love of Money, Football, and Competition law: An Analysis of whether UEFA's Financial Fair Play Regulations breach European competition law' (Honours Thesis, University of Otago, 2013) 15. Gaetano Taormina, 'UEFA's Financial Fair Play: Purpose, Effect, and Future' (2019) 42(4) *Fordham International Law Journal* 1268, 1303.

<sup>761</sup> The European Court has defined 'undertaking' as including every entity engaged in an economic activity, regardless of the legal status of the entity and the way it is financed' in Case C-41/90 *Hofner v Macrotron* (1991) ECR I-1979 at [21].

<sup>762</sup> The European Court dealt with this element in Case 56/65 *Societe Technique Miniere v Maschinenbau Ulm* (1966) ECR 234 at [249] when it stated that 'it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states'.

<sup>763</sup> Valerie Kaplan, 'UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications' (2015) 29(4) *Emory International Law Review* 799, 818.

<sup>764</sup> *Ibid.*

<sup>765</sup> Case T-193/02 *Piau v Commission of the European Communities* (2005) ECR 11-209 ('Piau') at [71]-[72].

regulations'.<sup>766</sup> Lindholm<sup>767</sup> and Flanagan<sup>768</sup> both support this view. Jemson concludes that UEFA would be seen as an association of undertakings as does Kaplan, who says that 'FFP is an explicit agreement between undertakings attempting to impose discipline in the football market violating Article 101(1)'.<sup>769</sup> She concludes that 'FFP is easily considered collusion between undertakings, as the different football associations and clubs approve of the agreement, the FFP Regulations'.<sup>770</sup> Taormina also supports this view stating that '[b]ecause it is revenue generating UEFA is likely to be considered an undertaking for the purposes of Article 101'.<sup>771</sup>

The second element relates to whether the FFP Regulations affect trade. This requirement was considered in *Societe Technique Miniere v Maschinenbau Ulm* ('*Societe Technique Miniere*'), where the European Court elaborated on what was needed for this element to be met. The Court stated that:

[I]t must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.<sup>772</sup>

Trade is given a wide meaning, which includes cross-border economic activity, and 'is not restricted to mere manufacture and distributor relationships'.<sup>773</sup> In the *Bosman* case, Advocate General Lenz considered that football players moving between European states amounted to trade.<sup>774</sup> Further, the agreement only has to have an indirect effect on trade, and this needs only to be potential rather than actual. In the circumstances, Kaplan seems to have assessed the situation correctly when she states:

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<sup>766</sup> Thomas James Jemson, 'For the Love of Money, Football, and Competition law: An Analysis of whether UEFA's Financial Fair Play Regulations breach European competition law' (Honours Thesis, University of Otago, 2013) 15.

<sup>767</sup> Lindholm (n 167) 198.

<sup>768</sup> Flanagan (n 12) 155.

<sup>769</sup> Kaplan (n 763) 816.

<sup>770</sup> *Ibid* 817.

<sup>771</sup> Gaetano Taormina, 'UEFA's Financial Fair Play: Purpose, Effect, and Future' (2019) 42(4) *Fordham International Law Journal* 1268, 1303.

<sup>772</sup> Case 56/65 *Societe Technique Miniere v Maschinenbau Ulm* (1966) ECR 234, 249 ('*Societe Technique Miniere*').

<sup>773</sup> Jemson (n 766) 17. See also *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C1 01/81 at [19].

<sup>774</sup> *Ibid*. See also *Bosman* (n 81) at [260]-[261].

As the UEFA is a European-wide organization, and the members of the football associations and clubs regularly do business amongst themselves through the buying and selling of players, or through playing each other, it is clear that FFP will have an influence on the pattern of trade between member states.<sup>775</sup>

Lindholm also refers to the judgment in *Societe Technique Miniere* and concludes that ‘it is likely that the Financial Fair Play rules will affect trade actually and directly and, at the very least, potentially influence it indirectly’.<sup>776</sup> Taormina concludes that ‘UEFA affects trade between member states because the break-even requirement restricts football clubs’ capacity to purchase players from different member states’.<sup>777</sup>

The third element is whether the FFP Regulations have as their object or effect the restriction of competition. The words ‘object’ and ‘effect’ need to be considered as alternatives, rather than on a cumulative basis with it being possible that one may restrict competition while the other does not. To determine if an agreement affects competition by object, the European Commission has suggested a number of factors that need to be taken into account. These are ‘in particular, the content of the agreement and the objective aims pursued by it’,<sup>778</sup> together with ‘the context in which it is (to be) applied or the actual conduct and behaviour of the parties on the market’.<sup>779</sup> There is no immediate evidence from the objectives of the FFP Regulations of any intention to restrict competition. However, other information provided by UEFA suggests perhaps there is. Its Benchmarking Report 2011 states that, ‘the control of wages...remains club football’s greatest challenge’.<sup>780</sup> UEFA has also stated that one of the objectives of the FFP Regulations is ‘to decrease pressure on salaries and transfer fees and limit inflationary effect’.<sup>781</sup> From information provided by UEFA itself, it is possible to argue that its object has anti-competitive effects.

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<sup>775</sup> Kaplan (n 763) 817.

<sup>776</sup> Lindholm (n 167) 199.

<sup>777</sup> Taormina (n 771) 1303.

<sup>778</sup> *Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements* [2014] OJ C 89/03, 14 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0328%2801%29>>.

<sup>779</sup> Ibid

<sup>780</sup> UEFA, ‘The European Club Licensing Benchmarking Report – Financial Year 2011’, *UEFA.com* (Web Page)

<[https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/91/61/84/1916184\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/91/61/84/1916184_DOWNLOAD.pdf)>.

<sup>781</sup> UEFA (n 589) 1.

There is also other evidence in addition to UEFA's own statements on the issue. The European Court held in *FA Premier League v QC Leisure*, that any agreement which restored the divisions between national markets would breach Article 101(1) by object.<sup>782</sup> Kaplan argues that this is what occurs with the implementation of the FFP Regulations which prevent clubs from utilising potential investor funds to improve their playing standard and, therefore, their opportunity to win some of the substantial prize money in UEFA's competitions.<sup>783</sup> Clubs are basically entrenched in their current positions with broadcasting money being distributed according to the population size of the country in which the club is located, adding to the contention that the FFP Regulations restore national divisions.<sup>784</sup> Kaplan maintains that '(s)eparating different national markets is frustrating the objective of the Treaty to integrate into a single economic market. By creating barriers between markets FFP Regulations are restricting the market by object, which is violating Article 101(1).'<sup>785</sup>

Jemson also contends that there appears to be a breach of Article 101(1) by object, but he focusses on price-fixing as the reason.<sup>786</sup> Price fixing is provided as an example of a restriction on competition by virtue of Article 101(1)(a). Jemson argues that this is what the FFP Regulations achieve with its 'soft' salary cap/breakeven provision, although he does concede that the regulations provide more flexibility than a usual salary cap, which could lead a court to determine that there is no price-fixing in the arrangement.<sup>787</sup> He concludes, however, that, 'as the regulations seem to operate as a price fixing arrangement, and they have the explicit aim of decreasing pressure on salaries, they appear to have an anti-competitive object'.<sup>788</sup> Although Lindholm does not see the FFP Regulations 'as egregious as price fixing agreements among sellers', he takes a similar view, seeing the FFP Regulations as having an anti-competitive object.<sup>789</sup>

But do the FFP Regulations have the *effect* of restricting competition? Following the European Court of Justice's decision in *Stergios Delimitis v Henniger BrauAG*, a two-step process is

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<sup>782</sup> Kaplan, (n 763) 819. See also Case C-403/08, *Football Association Premier League v QC Leisure* (2011) ECR 0000 at [247].

<sup>783</sup> *Ibid* 819–823.

<sup>784</sup> *Ibid*.

<sup>785</sup> *Ibid* 823.

<sup>786</sup> Jemson (n 766) 19.

<sup>787</sup> *Ibid*.

<sup>788</sup> *Ibid*.

<sup>789</sup> Lindholm (n 167) 200.

used to determine whether there is an effect on competition.<sup>790</sup> First, the relevant market needs to be defined and then the legal and economic effect of the agreement under scrutiny needs to be examined and analysed.<sup>791</sup> The market, in the case of the FFP Regulations, is European club football. The analysis requires consideration of the different areas of European club football to see how the FFP Regulations affects each area.<sup>792</sup> Two aspects which need to be considered are the restriction of investment by owners and the position of player transfer fees and their salaries.<sup>793</sup>

The breakeven provision means that an owner of a club is not able to invest money in their club with a view to improving the club's standing. Kaplan argues that given the basic lack of investment which the FFP Regulations impose, together with the prize money being awarded to the better performing clubs in UEFA competitions, it becomes very difficult for a smaller club to improve and compete against the larger clubs.<sup>794</sup> She maintains that:

The result of restricting investments entrenches the market within each league, and also entrenches which leagues are big, and which leagues are small. FFP impedes the access to the market-Europe-wide club competitions. FFP is restricting or distorting competition by actual effect.<sup>795</sup>

Taormina agrees with Kaplan, stating that '[u]ltimately, FFP serves as a barrier for new clubs and new investors who take over clubs'.<sup>796</sup> Jemson acknowledges that the FFP Regulations 'directly limit the amount of investment that some parties are able to invest into a club'<sup>797</sup> and that 'this also appears to be a restriction of competition under Article 101(1) of the Treaty'.<sup>798</sup> However, he does note that the number of persons affected by the investor limits would be small as the FFP Regulations do provide for a deviation allowance of €30 million from the breakeven provision, which would cover many investors' funding, with only the very wealthy being able to spend more than this allowance. Jemson states that 'if this was the only restriction

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<sup>790</sup> Kaplan (n 763) 824. See also *Stergios Delimitis v Henniger BrauAG* (1991) ECR I-935 at [20], [22] and [24].

<sup>791</sup> Ibid.

<sup>792</sup> Ibid.

<sup>793</sup> Ibid.

<sup>794</sup> Ibid 825–827.

<sup>795</sup> Ibid 828.

<sup>796</sup> Taormina (n 771) 1304.

<sup>797</sup> Jemson (n 766) 21.

<sup>798</sup> Ibid.

of competition, it may not be enough to substantiate a claim under Article 101(1) of the Treaty'.<sup>799</sup>

The FFP Regulations also impose restrictions on the transfer fees that clubs can pay for players. In some instances, clubs have not gone ahead with the transfer of a player because they acknowledge that they are going to breach the regulations.<sup>800</sup> Kaplan maintains that '(t)he artificial ceiling limiting the demand and supply of the market is one of the strongest arguments that FFP affects competition'.<sup>801</sup> A similar principle applies to player wages 'because their salaries will be capped at the amount that FFP allows clubs to spend, which cannot exceed the football-related revenue'.<sup>802</sup> Therefore, the effect of the FFP Regulations is that the smaller clubs are disadvantaged vis-a-vis the larger clubs which, due to their higher revenues, have more money available to spend on players and their salaries. The smaller clubs cannot compete with the larger clubs and therefore have restricted opportunities to gain prize money which would be a major way to increase their incomes. Their inability to compete shows the 'clear anti-competitive effect on the market'.<sup>803</sup>

Jemson takes a similar view to Kaplan, referring to the research of Dietl and others on 'soft' salary caps which indicates they tend to 'reduce overall salary cost and hence have an anti-competitive effect'.<sup>804</sup> He also refers to the research of Peeters and Szymanski who proposed that 'if the FFP Regulations had been in effect in the English Premier League for the 2009–10 season, wage to turnover ratios would have fallen by as much as 15%'.<sup>805</sup> Lindholm has a similar opinion, relying on the research of Dietl.<sup>806</sup> The actual wage to revenue ratio for European clubs within UEFA since the introduction of the FFP Regulations displays a somewhat mixed result. In 2013 and 2014, when wage growth reduced to 4.0% and 3.4%, the

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<sup>799</sup> Ibid 22.

<sup>800</sup> An example of this is Chelsea which was unable to buy Radamel Falcao and Edinson Cavani in 2013 due to the Financial Fair play restrictions. Another example is PSG which was unable to purchase Angel Di Maria in 2014 for similar reasons.

<sup>801</sup> Kaplan (n 763) 829.

<sup>802</sup> Ibid 832.

<sup>803</sup> Ibid 834.

<sup>804</sup> Jemson (n 766) 20. See also Helmut Dietl et al, 'Welfare Effects of Salary Caps in Sports Leagues with Win-Maximising Clubs' (Working Paper No 08-25, Institute for Strategy and Business Economics, University of Zurich, 2008) at 3–4.

<sup>805</sup> Ibid. See also Thomas Peeters and Stefan Szymanski, 'Vertical Restraints in Soccer: Financial Fair Play and the English Premier League' (Research paper 2012-028, Department of Economics, University of Antwerp, 2012) at 4.

<sup>806</sup> Lindholm (n 167) 200.

revenue growth of 6.8% and 5.0% was considerably higher.<sup>807</sup> However, 2015 saw wage growth increase to 7.6% against revenue growth of 7%.<sup>808</sup> This position was reversed in 2016 when revenue growth increased to 9.5% with wage growth also increasing, but not at such a rapid rate to 8.9%.<sup>809</sup> In 2017, revenue growth was 8.9% but this reduced in 2018 to 4.9%, whereas wage inflation rose from 6.7% in 2017 to 9.4% in 2018.<sup>810</sup> Interestingly, the percentage of club revenue spent on wages has remained relatively stable since 2012, when it was 65.2%. In 2018, the figure was 63.9% having reached a low point of 61.3% in 2017.<sup>811</sup> Although the figures are fluctuating, the FFP Regulations do not seem to have caused a reduction in overall salary cost since their introduction. It seems, on balance, that revenue growth has provided clubs with more income to spend.

Weatherill also suggests the FFP Regulations breach Article 101(1), stating:

FFP is a horizontal agreement between suppliers (of sports services: clubs) which includes commitments to restrain spending (inter alia on players' wages). It is also strengthened by vertical restraints (licensing requirements) enforced by UEFA, the governing body. It is a restriction on competition (to acquire players' services) which has the effect (inter alia) of depressing the levels of remuneration payable to players.<sup>812</sup>

Serby notes that the breakeven requirement acts as a 'soft' salary cap with the larger clubs having greater sums to pay in the upstream market for the better players. This gives them, due to more successful results, a larger return in the downstream markets of prize money, media rights and sponsorship.<sup>813</sup> This, coupled with the inability of the smaller clubs to provide investment monies, means that 'the FFP Regulations have created an 'oligopoleague', where it is 'very difficult for the smaller clubs to challenge the larger clubs for success and participation in UEFA's competitions'.<sup>814</sup>

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<sup>807</sup> UEFA, 'The European Club Footballing landscape – Club Licensing Benchmarking Report Financial Year 2018', *UEFA.com* (Web Page) 84 <[https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/63/79/75/2637975\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/63/79/75/2637975_DOWNLOAD.pdf)>

<sup>808</sup> *Ibid.*

<sup>809</sup> *Ibid.*

<sup>810</sup> 2018 is the latest year for which accurate figures are available.

<sup>811</sup> *Ibid.*

<sup>812</sup> Stephen Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press 2017) 274.

<sup>813</sup> Tom Serby, 'The state of EU sports law: lessons from UEFA's "Financial Fair Play" regulations' (2016) 16 *International Sports Law Journal* 37, 44.

<sup>814</sup> *Ibid.* 47.



#### 6.4 Article 101(3) of the TFEU

Article 101(3) provides a potential statutory exemption to Article 101(1). It applies where the agreement, decision or practice ‘contributes to improving the production or distribution of goods or to promoting technical or economic progress’. This contribution has been generally interpreted as meaning where there is a presence of efficiency gains. Thus there are four conditions that need to be met if Article 101(3) is to apply. These comprise the presence of efficiency gains,<sup>815</sup> with a fair share of those gains<sup>816</sup> being passed on to consumers, the restrictions must be needed to attain the efficiencies<sup>817</sup> and competition must not be eliminated in respect of a substantial part of the products concerned.<sup>818</sup> The four conditions are accumulative so if one condition is not met, reliance on Article 101(3) cannot occur.<sup>819</sup>

To help determine whether there are efficiency gains, the European Commission’s guidelines refer to the requirements to substantiate the nature of the efficiencies, the link between the agreement and the efficiencies, the likelihood and magnitude of each claimed efficiency and how and when each claimed efficiency would be achieved.<sup>820</sup> Kaplan argues that this first requirement is met ‘as one of the objectives of FFP is to introduce more discipline and rationality in club football finances and to protect the long-term viability of European club football. FFP is encouraging economic progress.’<sup>821</sup> Taormina supports Kaplan’s view stating that ‘[t]he break-even rule arguably creates efficiencies because it increases the financial stability and sustainability of football clubs due to its imposition of a balanced budget’.<sup>822</sup>

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<sup>815</sup> The purpose of this first condition is to define the types of efficiency gains that can be taken into account and be subject to the further tests of the second and third conditions. The efficiency claims need to be substantiated so that the nature of the claimed efficiencies, the link between the agreement and the efficiencies, the likelihood and magnitude of each claimed efficiency and how and when each claimed efficiency would be achieved, can be verified. See *Guidelines on the application of Article 81(3) of the Treaty* [2004] OJ C 101/97 at [50] and [51] (‘*Guidelines on Art 81(3)*’) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52004XC0427%2807%29>>.

<sup>816</sup> The concept of ‘fair share’ implies that the pass-on benefits must at least compensate consumers for any actual or likely negative impact caused to them by the restriction of competition under Article 101(1). See *Guidelines on Art 81(3)* (n 815) at [85].

<sup>817</sup> This third condition appears to contain a two-fold test: (1) the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies; and (2) the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies. See *Guidelines on Art 81(3)* (n 815) at [73].

<sup>818</sup> The last condition recognises that rivalry between undertakings is an essential driver of economic efficiency confirming that the ultimate aim of Article 101 is to protect the competitive process. See *Guidelines on Art 81(3)* (n 815) at [105].

<sup>819</sup> *Guidelines on the application of Article 101(3) of the Treaty* [2004] OJ C 101/08 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A126114>>.

<sup>820</sup> *Guidelines on Art 81(3)* (n 815), 6, para 51

<sup>821</sup> Kaplan (n 763) 836.

<sup>822</sup> Taormina (n 771) 1307.

Jemson also argues that the first condition is met on the basis that, although there are no cost efficiencies, qualitative efficiencies are apparent.<sup>823</sup> He argues that these efficiencies ‘can be traced directly to the objectives of increased financial stability and encouraging investment in infrastructure’.<sup>824</sup> However, Jemson believes that UEFA will have to produce evidence to show that the FFP Regulations provide the efficiencies claimed.<sup>825</sup> Bastianon supports Jemson’s view stating:

However, it is clear that UEFA cannot simply argue that the break-even rule is likely to produce the abovementioned efficiencies, it has to fully demonstrate the link between the break-even rule and the claimed efficiencies, the likelihood and the magnitude of such efficiencies. Although it is not possible to deny the potential relevance of such line of argument, to date it still seems very speculative and lacking in sound economic data.<sup>826</sup>

It should be noted that the views of Bastianon and Jemson were provided before UEFA had had the opportunity to obtain the evidence needed. UEFA would now have the evidence available to meet this concern by comparing the clubs’ revenue growth annual percentage increases with the generally lower annual wage growth percentage increases, indicating how much more financially viable clubs have become since the introduction of the FFP Regulations.<sup>827</sup>

So far as the second limb, allowing consumers a fair share of the resulting gains, is concerned, Kaplan states that, although clubs may be more financially viable, consumers do not benefit and may actually experience greater expense as ticket and merchandise prices may increase so clubs can increase their football-related revenue to help meet their breakeven commitment.<sup>828</sup> Jemson also contends that UEFA could struggle to show gains for the consumer as a result of its FFP Regulations.<sup>829</sup> He states that the FFP Regulations could adversely affect the quality of European football as the competitive balance within the various leagues and UEFA competitions could be reduced with the top sides having more income to

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<sup>823</sup> Jemson (n 766) 43–44.

<sup>824</sup> Ibid 44.

<sup>825</sup> Ibid 45.

<sup>826</sup> Bastianon, (n 608) 37.

<sup>827</sup> UEFA, ‘The European Club Footballing Landscape – Club Licensing Benchmarking Report Financial Year 2016’, *UEFA.com* (Web Page, 2016) 82 <[https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/53/00/22/2530022\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/53/00/22/2530022_DOWNLOAD.pdf)>.

<sup>828</sup> Kaplan (n 763) 836.

<sup>829</sup> Jemson (n 766) 45.

spend on players and their salaries due to the breakeven provision.<sup>830</sup> He also correctly points out that the burden of proof relating to consumers obtaining a fair share of the gains rests on UEFA.<sup>831</sup> Bastianon, too, maintains that ‘the deflationary effect on players’ salaries caused by the breakeven rule could force top football players to look for more remunerative contracts in countries outside the range of influence of UEFA regulations’,<sup>832</sup> thus causing a negative effect for consumers. Taormina agrees with Bastianon, stating that ‘FFP does not produce efficiencies for consumers because players’ earning power is limited by the relative spending cap’.<sup>833</sup> The arguments of Taormina and Bastianon can be countered by pointing out that the wealthy clubs can afford to pay the high salaries. There is no evidence of top players having their earning power limited or of an exodus of players to play in leagues outside Europe.

The third limb, requiring that the only restrictions imposed must be necessary to the attainment of the objectives ‘implies a two-fold test’.<sup>834</sup> The first part is that ‘the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies’.<sup>835</sup> The second part is that ‘the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies’.<sup>836</sup> Kaplan argues that there are less restrictive ways of achieving the aims of the FFP Regulations than the breakeven provision, so UEFA cannot meet the requirements of this limb.<sup>837</sup> Lindholm agrees with Kaplan, but also questions whether there is any need for measures to be taken to deal with club overinvestment.<sup>838</sup> Bastianon is of a similar view that there are less restrictive alternatives available and refers to the no overdue payables rule and the use of the breakeven rule without the restriction on ‘external funding’.<sup>839</sup> Taormina also considers that ‘[a] hard cap on spending...would likely achieve the same purported efficiencies with less pressure on competition because each team will be able to spend the same amount of income.’<sup>840</sup> By contrast, Jemson, argues that the requirements of this limb can be met because there is no less restrictive way of achieving the level of financial stability being sought than by utilising the

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<sup>830</sup> Ibid.

<sup>831</sup> Ibid 46. See also *Guidelines on Art 81(3)* (n 815) para 103.

<sup>832</sup> Bastianon (n 608) 37.

<sup>833</sup> Taormina (n 771) 1310.

<sup>834</sup> *Guidelines on Art 81(3)* (n 815), 8.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid.

<sup>837</sup> Kaplan (n 763) 837.

<sup>838</sup> Lindholm (n 167) 205–208.

<sup>839</sup> Bastianon (n 608) 37.

<sup>840</sup> Taormina (n 771) 1311.

breakeven provision.<sup>841</sup> Jemson's contention would seem to be correct in that the purpose of the FFP Regulations is financial stability, and that there is no better or more appropriate way of achieving this than the breakeven provision.

The purpose of the fourth limb is to prevent parties from eliminating competition in the process of introducing a restriction.<sup>842</sup> It 'requires a realistic analysis of the various sources of competition in the market, the level of competitive constraint that they impose on the parties to the agreement and the impact of the agreement on this competitive constraint'.<sup>843</sup> Kaplan argues that competition is restricted as clubs are limited in the money they can spend due to the breakeven requirement. Consequently owners cannot invest money in their clubs to allow them to compete with the wealthy clubs for the best players.<sup>844</sup> Jemson takes a similar view, preferring Long's argument to that of Clarke.<sup>845</sup> Long argues that a significant number of clubs cannot compete with the larger clubs for players due to their smaller revenues, whilst Clarke maintains 'a numeric or percentage salary cap will not eliminate competition completely in violation of this element'.<sup>846</sup> Taormina supports Clarke's view, stating that although the FFP Regulations restrict the revenue avenue of 'equity partner and related party investments',<sup>847</sup> it does not restrict 'other revenue streams like match-day income, TV broadcasting rights and sponsorship and commercial income.'<sup>848</sup> The FFP Regulations do not seem to eliminate competition and Taormina appears correct in that there are still many areas where revenue streams are not restricted and, even in the area of owner equity investments, there is the opportunity to utilise the voluntary agreement provision.

In summary, Kaplan, Jemson and Taormina maintain that UEFA will not be able to rely on the Article 101(3) exemption. Although Kaplan suggests that UEFA can only pass the first limb of the test, Jemson is of the opinion that it may be able to succeed on the first three limbs of the test but will ultimately fail on the final one. Taormina considers that UEFA would succeed on the first and fourth limbs but would fail on the third limb and perhaps also the

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<sup>841</sup> Jemson (n 766) 46–47.

<sup>842</sup> Kaplan (n 763) 837.

<sup>843</sup> *Guidelines on Art 81(3)* (n 815), 11, para 108.

<sup>844</sup> Kaplan (n 763) 837. See also Bastianon (n 608) 38. Bastianon is of the same opinion as Kaplan, that excluding external funding restricts competition.

<sup>845</sup> Jemson (766) 47–48. See also Natalie Clarke, 'The Beauty and the Beast: Taming the Ugly Side of the People's Game' (2011) 17 *Columbia Journal of European Law* 601, 637. See also Clinton Long, 'Promoting Competition or Preventing it? A Competition Law Analysis of UEFA's Financial Fair Play Rules' (2012) 23 *Marquette Sports Law Review* 75, 99.

<sup>846</sup> *Ibid.*

<sup>847</sup> Taormina (n 771) 1312.

<sup>848</sup> *Ibid.*

second one. Notwithstanding the view of the commentators, it may still be possible for UEFA to rely on the Article 101(3) exemption. This will be considered in detail in Chapter 9.

However, Article 101(3) is not the only way of defending a claim of anti-competitive behaviour under Article 101(1). A defence can also arise in the form of the ancillary restraint (*Wouters and others v Algemene Road van de Nederlandse Orde van Advocaten* ('*Wouters*')) exemption,<sup>849</sup> the block exemption regulation and the application of the 'de minimis' rule. These possibilities are considered below.

### 6.5 Ancillary Restraint (*Wouters*) Exemption

The ancillary restraint exemption is sometimes referred to as the *Wouters* exemption, because that case established this potential line of defence to Article 101(1). The exemption can arise in situations where the agreement restrains trade but the Court deems that the rule is proportionate and aimed at achieving a legitimate and necessary objective of the association of undertakings.<sup>850</sup> This exception needs to be distinguished from the statutory exemption under Article 101(3), which is based purely on an economic assessment 'weighing and balancing the pro and anti-competitive effects of the measure in question and determining whether it is economically beneficial to allow the measure, despite its anti-competitive restrictions'.<sup>851</sup> The *Wouters* exemption takes a different approach considering non-economic matters and the public interest perspective.<sup>852</sup>

The *Wouters* case concerned a lawyer who wanted to practise law in the Netherlands within a firm of accountants.<sup>853</sup> The Bar of the Netherlands had a regulation prohibiting multidisciplinary partnerships between lawyers and accountants. The matter was referred to the European Court which held that although the Bar's rules infringed Article 101(1) as competition was restricted, it would not be infringed where the regulation 'is necessary in

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<sup>849</sup> Case C-309/99 *Wouters and others v Algemene Road van de Nederlandse Orde van Advocaten* (2002) ECR I-1577 ('*Wouters*').

<sup>850</sup> Kaplan (n 763) 837.

<sup>851</sup> Jemson (n 766) 24.

<sup>852</sup> Charlotte Janssen and Erik Kloosterhuis, 'The *Wouters* case law, special for a different reason?' (2016) 37(8) *European Competition Law Review* 335, 339. Janssen and Kloosterhuis argue that the test 'can only be explained by the involvement of the legislature'. They conclude that 'the more lenient substantial assessment that is developed in the *Wouters* doctrine in comparison with art. 101(3) TFEU can only apply when a delegation of regulatory or supervisory powers by the government is present as only then part of the necessary "balancing act" has already been performed by the legislature.'

<sup>853</sup> *Wouters* (n 849).

order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned'.<sup>854</sup>

A similar line of reasoning was used in the *Ordem dos Technicos Oficiais de Contas*<sup>855</sup> and *Consiglio Nazionale dei Geologis*,<sup>856</sup> also involving professional bodies, as well as in *Anonima Petroli Italiana SpA*,<sup>857</sup> where the regulating body, the 'Osservatorio', sought to use the fixing of minimum prices to achieve road safety.<sup>858</sup> The *Wouters* exemption has also been used in sports' cases but Janssen and Kloosterhuis consider that its use in sports' cases is linked to the doctrine of ancillary restraints as the Court did not consider 'consumer or public interest objectives but rather the interest of the activity (professional sports) itself'.<sup>859</sup> In *Meca-Medina*,<sup>860</sup> two swimmers challenged their ban for using drugs. The Court held that the rules followed a legitimate objective, that the sport (swimming in this case) was conducted fairly and that the restrictions (penalties) were proportionate to the necessity for the regulations.<sup>861</sup> The Court described the elements of the *Wouters* exemption as follows:

[A]ccount must first be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.<sup>862</sup>

The same principles were applied in the *ENIC/UEFA* case<sup>863</sup> where a company challenged the UEFA rule that prevented ownership of more than one club participating in the same

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<sup>854</sup> Ibid at [107].

<sup>855</sup> Case C-1/12 *Ordem dos Technicos Oficiais de Contas (OTOC) v Autoridade da Concorrenca* (2013) ECLI:EU:C:2013:127. In this case, the rules of the Portuguese Order of Chartered Accountants were held to be unnecessary to pursue its objective of guaranteeing the quality of its members' services.

<sup>856</sup> Case C-136/12 *Consiglio Nazionale dei Geologi (CNG) v Autorita Garante della Concorrenza e del Mercato* (2013) ECLI:EU:C:2013:489. This case involved the rules of the National Association of Geologists and whether its rules, which, prima facie, restricted competition, could be exempt as they were necessary for the implementation of the legitimate objective of providing guarantees to consumers of geologists' services.

<sup>857</sup> Case C-184/13 *API – Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti* (2014) ECLI:EU:C:2014:2147. The Court held that minimum prices went beyond what was necessary for the implementation of the legitimate objective and that there were more effective and less restrictive ways of protecting road safety.

<sup>858</sup> Janssen and Kloosterhuis (n 852) 336.

<sup>859</sup> Ibid.

<sup>860</sup> *Meca-Medina* (n 738).

<sup>861</sup> Jemson (n 766) 28.

<sup>862</sup> *Meca-Medina* (n 738) [42].

<sup>863</sup> Case 37806 *ENIC/UEFA* (European Commission, 25 June 2002).

competition. The European Commission found the restriction to be legitimate as the objective was to ensure the integrity of its competitions.<sup>864</sup>

Thus, in applying the *Wouters* exemption, the Court has three questions to determine:

1. Is the undertaking's objective legitimate?
2. Is the restriction inherent/necessary to achieve its objective?
3. Is the restriction proportionate/reasonable?

In applying the first question to the circumstances of the FFP Regulations, Kaplan concedes that it would probably be satisfied since UEFA's aims include protecting the long-term viability of European club football by making clubs compete within their financial means by complying with the breakeven provision.<sup>865</sup> Taking a similar view, Jemson argues that sport has a need for the 'mutual interdependence of sports teams' and that this justifies UEFA's intervention.<sup>866</sup> He also refers to the judgment in *Meca-Medina* where the Court suggested that the 'organisational and proper conduct of competitive sport' was a legitimate objective.<sup>867</sup> Taormina also views the objective as legitimate 'when considering the history of financial issues that football clubs experienced as a result of overspending and overdependence on wealthy owners'.<sup>868</sup>

Regarding the second question, Jemson, Taormina and Kaplan are at variance with Kaplan. The latter does not accept that the breakeven provision is inherent in the justified objective, and that there are alternative and more appropriate ways for UEFA to achieve its objectives.<sup>869</sup> By contrast, Jemson holds the view that UEFA's imposition of a restriction on club spending may be inherent in achieving its aim of financial stability within European football.<sup>870</sup> He suggests that 'this conclusion does not appear to be any more controversial than saying anti-doping penalties are necessary to ensure that competition between athletes is fair' and considers that there are no other adequate alternative measures that could be used to overcome

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<sup>864</sup> Ibid.

<sup>865</sup> Kaplan (n 763) 837–838.

<sup>866</sup> Jemson, (n 766) 26. See also Umberto Lago, Rob Simmons and Stefan Szymanski, 'The Financial Crisis in European Football: An Introduction' (2006) 7 *Journal of Sports Economics*, 3,4, and Commission of the European Communities *White Paper on Sport* (Accompanying document to the White Paper on Sport, 11 July 2007) 36.

<sup>867</sup> Ibid 27.

<sup>868</sup> Taormina (n 771) 1305.

<sup>869</sup> Kaplan (n 763) 838.

<sup>870</sup> Jemson (n 766) 27.

the issue of financial viability.<sup>871</sup> Taormina supports Jemson in viewing the restriction as necessary, stating ‘the imposition of timely payable payments and prudent budgetary management are likely also inherent in the pursuit of ensuring the sustainability and viability of European football clubs’.<sup>872</sup> On balance, the views of Jemson and Taormina are preferable as there does not seem to be a better alternative for UEFA to achieve financial stability than through the FFP Regulations and, in particular, the breakeven provision.

When discussing the third question of proportionality, there are three stages to manage:

1. Whether the measure was suitable to achieve a legitimate aim;
2. Whether it was necessary to achieve that aim; and
3. Even if there are no less restrictive means, whether the measure has an excessive effect on the applicant’s interests.<sup>873</sup>

Jemson maintains that UEFA can pass the first stage by showing that the breakeven provisions are working successfully and achieving objectives and that it can also show it has procedures in place to make the provisions work effectively.<sup>874</sup> For the second stage, Jemson considers other possible ways of inducing financial stability, but views the breakeven provision as the most effective.<sup>875</sup> In regard to the third stage, Jemson acknowledges that the risk of a club going into liquidation is low but offsets this by pointing out that ‘the interdependent nature of sports leagues means that any financial collapse can cause significant disruptions.’<sup>876</sup> This is because of the interdependent nature of teams in sporting competitions discussed in Chapter 2.2. He also takes the view that the detriment to clubs and players under the FFP Regulations is not likely to be financially very large and that, therefore, from a proportionate perspective it is more appropriate to have the restriction in place.<sup>877</sup> Flanagan acknowledges that the FFP Regulations do not appear to promote competitive balance as they favour the large, well-established clubs. He suggests that ‘there is sufficient scope for UEFA to argue that financial

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<sup>871</sup> Ibid 28. Jemson is contending that UEFA’s situation is similar to the situation in *Meca Medina* where the Court held that the doping regulations used against Meca-Medina and Majcen were necessary (inherent) in the pursuit of the IOC’s objective to produce a fair competition between competitors.

<sup>872</sup> Taormina (n 771) 1305.

<sup>873</sup> Paul Craig and Grainne De Burca, *EU Law* (5<sup>th</sup> ed, Oxford University Press, New York, 2011) 526.

<sup>874</sup> Jemson (n 766) 31–32.

<sup>875</sup> Ibid 32–41.

<sup>876</sup> Ibid 41–42. The interdependent nature of teams in sporting competitions was discussed in 2.2 above.

<sup>877</sup> Ibid.



governance in football is needed’ and ‘that FFP can reasonably be considered suitable and not excessively restrictive’.<sup>878</sup>

In contrast to Jemson’s and Flanagan’s view, Kaplan advocates that the FFP Regulations are not proportionate and ‘go beyond what is necessary for football clubs to conduct proper economic practices’.<sup>879</sup> Her view is that ‘there are alternatives available to achieve financial stability in football’.<sup>880</sup> Lindholm agrees with Kaplan, but also questions the need for any measures to be taken at all to deal with club overinvestment. He also maintains that ‘there are other measures reasonably capable of doing the same and which have certain advantages’<sup>881</sup> and advocates that ‘an absolute salary cap would both solve the root cause of inequitable resources and promote competitive balance’.<sup>882</sup> Bastianon does not see the breakeven rule as being integral to any of the FFP Regulations, particularly the restriction placed on investment, and from a proportionate perspective he suggests that ‘if the problem UEFA wants to combat is financial doping<sup>883</sup>...the no overdue payable rule alone can represent the more correct answer’.<sup>884</sup> Supporting Kaplan in viewing the FFP Regulations as not proportionate, Taormina suggests ‘a recalibration of monetary awards and broadcasting revenue distribution’<sup>885</sup> might be sufficient. Alternatively, Taormina suggests ‘the implementation of a hard spending cap because overspending would still be curtailed, but the negative effect of competition would be less severe’.<sup>886</sup>

The contrasting views of Jemson and Flanagan and Kaplan, Lindholm, Taormina and Bastianon mean that there are likely to be different opinions about how the ECJ would interpret the *Wouters* exemption in UEFA’s situation in respect of the FFP Regulations. Kaplan, Lindholm, Taormina and Bastianon are of the opinion the ECJ would reject the exemption as applying to UEFA’s situation, whereas Jemson and Flanagan maintain that it would apply. On balance, the views of Jemson and Flanagan are preferable as the FFP Regulations, through the

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<sup>878</sup> Flanagan (n 12) 163. In his article, Flanagan specifically looks at club insolvency and the level of inflation of players’ wages to determine the financial stability of European football.

<sup>879</sup> Kaplan (n763) 838.

<sup>880</sup> Ibid. Kaplan’s alternatives are considered in part 5 of her article (850–856) and include consideration of both the German and French football associations’ financial regulations as well as the use of a salary cap, a luxury tax and revenue sharing. These alternatives are all considered in Chapter 6.

<sup>881</sup> Lindholm (n 167) 205–208.

<sup>882</sup> Ibid 210.

<sup>883</sup> Bastianon (n 608) 35. Bastianon defines financial doping as the situation where clubs spend money they do not have, get into debt and ultimately go bankrupt.

<sup>884</sup> Ibid.

<sup>885</sup> Taormina (n 771) 1305.

<sup>886</sup> Ibid.

use of the breakeven provision, are proportionate and the most appropriate way to achieve financial stability for European football. This will be considered further in Chapter 9 when the application of the *Wouters* exemption to the FFP Regulations is reviewed in detail.

Finally, the views of Kievit should be noted.<sup>887</sup> He states that the *Wouters* exemption would not apply to the FFP Regulations as they are an economic issue, which is dealt with under Article 101(1).<sup>888</sup> This view is incorrect because the *Wouters* exemption considers the issue from a public interest perspective. The *Wouters* case is similar to the *Meca-Medina* case with both having economic implications and involving associations looking after the interests of their members. *The Wouters* exemption applied in the *Meca-Medina* case and would also apply to the FFP Regulations in the UEFA example.

## 6.6 Block Exemption Regulation

Block exemption regulation is another way to avoid the provisions of Article 101(1). There are two main areas, the first being the exemption of categories of agreement by the European Commission and the second being the 30% threshold exemption that applies to vertical agreements.

As mentioned earlier in this chapter, under Article 101(3) the European Commission can declare the provisions of Article 101(1) to be inapplicable where agreements not only help to improve production or distribution of goods or promote technical or economic progress but also provide consumers with a share of the resulting benefit.<sup>889</sup> European Council regulations give the European Commission the power to apply Article 101(3) to certain types of agreement and also the power to declare that Article 101(1) does not apply to certain categories of agreement.<sup>890</sup>

The Commission has used the ‘block exemption’ regulation to exempt some groups of similar agreements where pro-competitive benefits outweigh their anti-competitive effects. These categories automatically benefit from the exemption of Article 101(3) provided ‘they do not seal off markets by preventing access and parallel trade’.<sup>891</sup> The types of agreements that have obtained an exemption in this manner include specialisation agreements (where the parties

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<sup>887</sup> Brian Kievit, ‘Yellow card, red card or no card at all? Analysis of the UEFA Financial Fair Play regulations under European Competition Law and beyond’ (Master’s Thesis, Tilburg University, 2014) 31.

<sup>888</sup> Ibid.

<sup>889</sup> ‘15.3.3 Exemption of categories of agreements in the EU’, *Europedia* (Web Page, 2011) <[www.europedia.moussis.eu](http://www.europedia.moussis.eu)>.

<sup>890</sup> Ibid.

<sup>891</sup> Ibid.

agree not to manufacture certain products themselves so as to concentrate on the manufacture of other products) provided the combined market share of the parties does not exceed 20%.<sup>892</sup> Others are research and development agreements where the parties do not hold a market share of above 25%, and technology transfer agreements, which are generally considered to provide economic efficiencies and to be pro-competitive.<sup>893</sup> Since the FFP Regulations do not fall into any of these types of contracts, UEFA will not be able to utilise this exemption.

The second block exemption area relates to vertical agreements where undertakings are generally exempt from Article 101(1) provided the market share held by each of the parties does not exceed 30%. Above the 30% threshold, agreements are not presumed to be unlawful but will need to have their legitimacy established by utilising the Article 101(3) exemption.<sup>894</sup>

From the perspective of the FFP Regulations, the 30% threshold exemption could potentially apply. There are two issues that need to be resolved for this to be the case. The first is whether there is a vertical agreement between UEFA and the national football associations. The second is whether the market share involved is greater than 30%.<sup>895</sup> Kaplan maintains that the block exemption will not apply to UEFA's situation because, irrespective of whether the agreement is vertical or horizontal, the market share involved is greater than 30% 'as FFP and UEFA concern almost the totality of the European-wide club competitions'.<sup>896</sup> She appears to be correct in this respect.

In the circumstances, neither of the block exemptions will apply to the FFP Regulations.

### 6.7 *De Minimis Rule*

The de minimis non curat lex (De Minimis) rule<sup>897</sup> is applied to agreements where the market share or shares involved are small and, are considered by the European Commission to have a very minimal restriction on competition within the meaning of Article 101(1). In these circumstances, the European Commission will not commence legal proceedings either of its

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<sup>892</sup> Ibid 2.

<sup>893</sup> Ibid.

<sup>894</sup> Ibid. Horizontal agreements normally require parties to be competing but certain categories, including specialisation agreements, research and development agreements and technology transfer agreements, are granted block exemptions. See Collyer Bristow, 'An introduction to UK and EU competition law for overseas clients', *Lexology* (Web Page, 25 August 2015) <<https://www.lexology.com/library/detail.aspx?g=0f927031-4ad7-437b-b9d7-0b5dbbb7588b>>.

<sup>895</sup> Kaplan (n 763) 836.

<sup>896</sup> Ibid.

<sup>897</sup> The 'de minimis non curat lex' rule means that 'the law does not deal with trivial breaches'.

own volition or upon the request of a third party. The Commission's view is that Article 101(1) will not need to be invoked in the following situations:

If the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors); or

If the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).<sup>898</sup>

Where difficulties arise in classifying whether an agreement is between competitors and non-competitors the 10% threshold applies.<sup>899</sup>

UEFA appears to have a dominant market position and therefore the FFP Regulations appear to fall outside the De Minimis rule. Jemson takes this view<sup>900</sup> and Kaplan agrees, acknowledging that 'FFP has a strong effect on the defined market' and 'will affect every club that wants to play European football'.<sup>901</sup> Flanagan adopts a similar approach and states that '(s)ince UEFA is the sole organiser of professional football in Europe, the *de minimis* exception does not apply to the Financial Fair Play rules'.<sup>902</sup> The views of the commentators in relation to the De Minimis rule appear correct.

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<sup>898</sup> Notice on agreements of minor importance which do not appreciably restrict competition under 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2004] OJ C 291, para 8

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.291.01.0001.01.ENG&toc=OJ:C:2014:291:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.291.01.0001.01.ENG&toc=OJ:C:2014:291:TOC).

Agreements may fall outside Article 101(1) because they are not capable of *appreciably affecting* trading between Member States. The commission uses a combination of a 5% market share threshold and a €40 million turnover threshold to help to determine if an agreement falls into this category (para 4). '15.3.1 The "de minimis" rule concerning agreements in the EU', *Europedia* (Web Page, 2011) [www.europedia.moussis.eu](http://www.europedia.moussis.eu).

<sup>899</sup> Ibid para 9. Where competition is restricted by the cumulative effect of agreements for the sale of goods or services entered into by different bodies, the market share thresholds are reduced to 5%, both for agreements between competitors and for agreements between non-competitors. A cumulative foreclosure effect is unlikely to exist if less than 30% of the relevant market is covered by parallel (networks of) agreements having similar effects (para 10). The Commission also holds the view that agreements do not appreciably restrict competition if the market shares of the parties to the agreement do not exceed the thresholds of, respectively, 10%, 15% and 5% set out in points 8, 9 and 10 during two successive calendar years by more than 2 percentage points (para 11).

<sup>900</sup> Jemson (n766) 22.

<sup>901</sup> Kaplan (n 763) 839.

<sup>902</sup> Lindholm (n 167) 199.

## 6.8 Article 102 of the TFEU

Article 102 aims to prevent undertakings which hold a dominant position in the market from abusive conduct and states that:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- b) limiting production, markets or technical development to the prejudice of consumers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 was introduced to help control monopolies within the internal market from restricting competition.<sup>903</sup> The aim was to ‘protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’.<sup>904</sup> The Article applies to undertakings which have a dominant position in a market or markets within the European Union.<sup>905</sup> The position can be held by one undertaking (single dominance) or by two or more undertakings (collective dominance).<sup>906</sup> Dominance has been held to provide a special responsibility on the undertaking concerned and needs to be considered by looking at the particular circumstances of each case.<sup>907</sup> It has been defined as arising when an

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<sup>903</sup> Slaughter and May, ‘An Overview of EU Competition Rules’ (Web Page, 2011) <<https://prodstoragesam.blob.core.windows.net/highq/64578/eu-competition-rules-horizontal-agreements.pdf>>.

<sup>904</sup> Catherine Bernard and Steve Peers. *European Union Law* (Oxford University Press, 2014) 506.

<sup>905</sup> *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] OJ C 45, para 4 (‘Art 82 enforcement priorities’).

<sup>906</sup> *Ibid.*

<sup>907</sup> *Ibid* para 9. See also Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461, para 57; Case T-83/91 *Tetra Pak v Commission (Tetra Pak II)* [1993] ECR II-755, paragraph 114; Case T-111/96 *ITT Promedia v Commission* [1998] ECR II-2937, para 139; Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 112; and Case T-203/01 *Michelin v Commission (Michelin II)* [2003] ECR II-4071, para 97.

undertaking, due to its position of economic strength, has power ‘to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers’.<sup>908</sup> Dominance is assessed by looking at the product and geographic markets.<sup>909</sup> The market share is also considered and the European Commission has stated that ‘if an undertaking has a market share of less than 40%, it is unlikely to be dominant’.<sup>910</sup> The assessment of dominance takes into account the ‘competitive structure of the market’<sup>911</sup> as well as the market position of the dominant undertaking and its competitors, the ability of other undertakings to expand or for a new one to enter the market, and the countervailing consumer power.<sup>912</sup>

The other word that needs to be examined is ‘abuse’ because being an undertaking in a dominant position is not, in itself, illegal.<sup>913</sup> A dominant undertaking can compete on merit like any other undertaking but it cannot abuse its position to affect trade and distort or interfere with competition.<sup>914</sup> There are different types of abuse including exclusionary, exploitative and discriminatory.<sup>915</sup> Examples of abuse include exclusive purchasing,<sup>916</sup> tying and bundling,<sup>917</sup> predatory conduct,<sup>918</sup> refusal to supply<sup>919</sup> and margin squeeze.<sup>920</sup> None of these examples would apply to UEFA’s case, which does not fit the usual situation of one

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<sup>908</sup> Ibid para 10.

<sup>909</sup> European Commission, *Antitrust procedures in abuse of dominance (Article 102 TFEU cases)* (Viewed 30 May 2017) <[https://ec.europa.eu/competition/antitrust/procedures\\_102\\_en.html](https://ec.europa.eu/competition/antitrust/procedures_102_en.html)>.

<sup>910</sup> Ibid.

<sup>911</sup> *Art 82 enforcement priorities* (n 905), para 12.

<sup>912</sup> Ibid.

<sup>913</sup> European Commission (n 909) 1.

<sup>914</sup> Ibid.

<sup>915</sup> Neelie Kroes (European Commission), ‘Preliminary Thoughts on Policy Review of Article 82’ (Speech Fordham Corporate Law Institute, New York, 23 September 2005) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_05\\_537](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_537)>.

<sup>916</sup> Exclusive purchasing occurs when buyers can only purchase all units of a particular product from the dominant company.

<sup>917</sup> ‘Tying’ occurs where customers buying one product are required to purchase another product from the dominant undertaking. ‘Bundling’ refers to the way products are offered and priced by the dominant undertaking. Pure bundling means the products are only sold jointly in fixed proportions. Whereas for mixed bundling, the products are also sold separately but the sum of the individual product prices is higher than the bundled price. *Art 82 enforcement priorities* (n 905), para 48.

<sup>918</sup> Predatory conduct occurs when a dominant undertaking deliberately incurs losses or foregoes profits in the short term so as to harm actual or potential competitors, thus causing consumer harm. *Art 82 enforcement priorities* (n 905), para 63.

<sup>919</sup> Refusal to supply can occur when a dominant undertaking refuses to supply a competitor so it can sell its product direct to consumers without competition. Other types of refusal include conditional sales subject to limitation on the purchaser’s conduct, halting supplies to punish the purchaser for dealing with competitors or refusing to supply customers that do not agree to tying arrangements. *Art 82 enforcement priorities* (n 905), paras 75–77.

<sup>920</sup> Margin squeeze occurs where the dominant undertaking sells a product to its customer at a price very similar to the price it is selling the product direct to the consumer. *Art 82 enforcement priorities* (n 905), para 80.

undertaking competing against another. In UEFA's case, it is an administrative body looking after the interests of European football and acting for its members in introducing measures to benefit and protect its sport. More generally, for an abuse to be established it is necessary for the dominant undertaking to have the potential to influence the position of residual competition on the market and for the undertaking to foreclose their competitors in an anti-competitive way which has an impact on consumer welfare. UEFA's behaviour is unlikely to be considered abusive as it obtained support from the national associations and other stakeholders before implementing its FFP Regulations and did not unilaterally impose them. It should also be noted that, unlike Article 101(1), there is no qualifying sub-section to Article 102. Instead, claims put forward by a dominant undertaking that its conduct is justified are considered.<sup>921</sup> This can be by the dominant undertaking demonstrating that its conduct is either objectively necessary or that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers.<sup>922</sup> In other words, the same defences available to Article 101(1) by virtue of Article 101(3) and the ancillary restraints exemption are also available for Article 102.

Three elements need to be taken into account when considering whether there has been an infringement of Article 102. First, 'whether there is conduct done by a single undertaking in a dominant position'; secondly, 'the conduct must affect a substantial amount of the market'; and thirdly, 'the undertaking, due to its dominant position, is abusively exploitative'.<sup>923</sup> Kaplan considers these from the context of the FFP Regulations. In respect of the first element, she argues that UEFA can be viewed as dominant from either a single or collective entity perspective, and suggests that 'UEFA and the national football associations can be considered as having collective dominance because each is a separate economic entity, but act collectively as one in the European football market'.<sup>924</sup> In relation to the second element Kaplan states that 'through the geographic reach and the amount of money involved it is clear that there is a substantial part of the market involved'.<sup>925</sup> In regard to the third element she argues that UEFA, whether acting in a collective or single dominance, 'influences the market and weakens competition'. Further, by controlling which clubs can play in its competitions 'UEFA ensures that the clubs' positions in the domestic club market will be entrenched, preventing

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<sup>921</sup> *Art 82 enforcement priorities* (n 905), para 28.

<sup>922</sup> *Ibid.*

<sup>923</sup> Kaplan (n 763) 839.

<sup>924</sup> *Ibid* 843.

<sup>925</sup> *Ibid.*

opportunities to significantly improve standing'.<sup>926</sup> Although concluding UEFA to be in breach of Article 102, Kaplan does concede that a weakness in her argument is that the clubs did approve the FFP Regulations, and, thus, proving abuse may be difficult.<sup>927</sup> She, therefore, concludes that the case against UEFA is stronger under Article 101 than under Article 102.<sup>928</sup>

Kaplan considers possible defences to Article 102, referring to objective justification and lack of an appreciable effect on trade between member states.<sup>929</sup> She suggests that neither will apply, stating that the FFP Regulations, although having a legitimate objective, go further than is necessary, with less onerous options existing which would protect financial viability. Moreover, the regular transfer of players between clubs in different states reveals a large volume of inter-state trade.<sup>930</sup>

By contrast, Jemson states that 'a challenge to the FFP Regulations under Article 102 of the Treaty is highly unlikely'.<sup>931</sup> He accepts that UEFA is in a dominant position but does not believe that UEFA has abused its position. Jemson also acknowledges that there is no definition of the word 'abuse', noting that one of the principles for defining abusive conduct relates to whether it causes harm to consumers, which does not occur as a result of the FFP Regulations.<sup>932</sup>

Lindholm also notes that UEFA's behaviour does not fit under the three usual types of abusive behaviour, namely, 'exploitive abuse that prejudices consumers, exclusionary abuse that injures competitors, and reprisal abuse that punishes another undertaking for its actions'. Nor does it align with 'any of the examples of abuse in the Treaty'.<sup>933</sup> In the circumstances, Lindholm concludes that UEFA's behaviour does not fall within the boundaries of Article 102.<sup>934</sup> Lindholm and Jemson's views appear correct and it is unlikely that Article 102 would apply to the FFP Regulations on the basis that stakeholders, comprising particularly the national associations and the clubs, approved their introduction.

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<sup>926</sup> Ibid 843–848.

<sup>927</sup> Ibid 848.

<sup>928</sup> Ibid 848–849.

<sup>929</sup> Ibid 849.

<sup>930</sup> Ibid.

<sup>931</sup> Jemson (n 766) 13.

<sup>932</sup> Ibid. Jemson refers to the guiding principles of abuse developed by Richard Whish. Whish's first principle is that 'behaviour is only abusive where it...is likely to cause clear and demonstrable harm to consumer'. See Richard Whish, *Competition Law* (6<sup>th</sup> edition, Oxford University Press, New York, 2009) 1.

<sup>933</sup> Lindholm (n 167) 201.

<sup>934</sup> Ibid.



## 6.9 Article 45 of the TFEU

Article 45 deals with the free movement of workers and states that:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - a) to accept offers of employment actually made;
  - b) to move freely within the territory of Member States for this purpose;
  - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 45 provides free movement of workers within the European Union.<sup>935</sup> However, it is only European Union nationals who enjoy the right to free movement and the Article only applies where there is an inter-state element.<sup>936</sup> The definition of worker was established in the *Deborah Lawrie-Blum v Land Baden-Württemberg* ('*Lawrie-Blum*')<sup>937</sup> as being a person who 'performs services for and under the direction of another person in return for which he receives remuneration'. In *Levin v Staatssecretaris van Justitie*,<sup>938</sup> it was established that the worker must be engaged in genuine and effective economic activity that cannot be regarded as purely ancillary and marginal. In accordance with the definition of worker established in

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<sup>935</sup> Hannelin states, 'Free movement of workers is enshrined in Article 45 TFEU. The article aims to abolish all discrimination based on nationality between workers from member States in regards to employment, remuneration and other conditions of work and employment.' See Heikki Hannelin, 'Professional Team Sports – Nationality Discrimination and EU Law' (2016) 10(1) *Helsinki Law Journal*, 78, 81.

<sup>936</sup> *Ibid.*

<sup>937</sup> Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 284 at [17] ('*Lawrie-Blum*').

<sup>938</sup> Case 53/81 *D M Levin v Staatssecretaris van Justitie* [1982] ECR 105 at [17].

*Lawrie-Blum*, the ECJ has generally considered professional team sports players to be workers since they are basically seen as employed by the club and remunerated for their efforts, whether employed on a full-time or part-time basis.

Article 45 is broad in nature and only provides a limited framework so it has been necessary for the law to be developed by the ECJ.<sup>939</sup> The main development arose in the case of *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milan* ('*Gebhard*')<sup>940</sup> but, before considering that case, *Bosman*,<sup>941</sup> which is the principal case heard by the ECJ involving European football will be briefly examined.

Prior to *Bosman*,<sup>942</sup> the football transfer system 'limited the bargaining positions of players by putting control of player movement in the hands of club management'.<sup>943</sup> The transfer system prevented a player moving to a new club without the consent of the player's old club, even if the player's contract had ended.<sup>944</sup> The ECJ determined this transfer system to be illegal and found in favour of *Bosman*, ruling that:

Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member state unless the latter club has paid to the former club a transfer, training or development fee.<sup>945</sup>

As mentioned in Chapter 4.5, the *Bosman* case<sup>946</sup> also challenged UEFA's rule restricting the number of foreign players allowed to play for a club in any one game. Restrictions originally commenced from the early 1960s and in 1978 UEFA and the European Commission came to a 'gentlemen's agreement' in which clubs were restricted to field only three foreign players plus a further two foreign players who had played in the country for at least five years

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<sup>939</sup> Armin Cuyvers, 'Free Movement of Persons in the EU' in Emmanuel Ugirashebuja, John Eudes Rushangisa, Tom Ottervanger and Armin Cuyvers, *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill, Leiden, The Netherlands, 2017) 354, 356.

<sup>940</sup> Case 55/94, *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECR (1995) I-04165 ('*Gebhard*').

<sup>941</sup> *Bosman* (n 81).

<sup>942</sup> *Ibid.*

<sup>943</sup> Andrew Lee, 'The *Bosman* Case: protecting Freedom of Movement in European Football' (1995) 9(3) *Fordham International Law Journal* 1255, 1257.

<sup>944</sup> Stephan Zivec, 'Freedom of Movement for Workers Impact on transfers of EU football players: The *Bosman* Case', *Academia* (2013) <[http://www.academia.edu/4221444/Freedom\\_of\\_Movement\\_for\\_Workers\\_-\\_Bosman\\_Case](http://www.academia.edu/4221444/Freedom_of_Movement_for_Workers_-_Bosman_Case)>.

<sup>945</sup> *Bosman* (n 81) at [114].

<sup>946</sup> *Ibid.*

continuously.<sup>947</sup> This rule was known as the ‘three plus two’ rule.<sup>948</sup> The ECJ determined that the ‘three plus two’ rule’ did not comply with Article 45 ruling:

Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organise, football clubs may field only a limited number of professional players who are nationals of other Member States.<sup>949</sup>

The decision in the *Bosman* case<sup>950</sup> made it clear that sport, European football in this case, was not exempt from European law and that the provisions of Article 45 were to be strictly applied.

The case of *Gebhard*<sup>951</sup> concerned a German lawyer and his right to practise as a lawyer in Italy using the Italian title of ‘avvocato’. The ECJ held that where the employment is subject to certain requirements in a host member state, a person from another member state must in principle comply with those rules. In this case, the ECJ held that Gebhard from Germany needed to have the appropriate qualifications, or their equivalent, to practise law in Italy, and also belong to that country’s professional body. The ECJ also determined that in deciding whether Gebhard met the required criteria, the professional body needed to meet four conditions.<sup>952</sup> First, the professional body needed to apply their rules in a non-discriminatory manner.<sup>953</sup> Secondly, the rules had to be justified by imperative general interest requirements.<sup>954</sup> Thirdly, the rules needed to be suitable for the attainment of the objective sought. Fourthly the professional body must not seek more than what was required to meet those rules.<sup>955</sup> In essence, the tests are similar to the ones of suitability, necessity and proportionality used in the ancillary restraint (*Wouters*) exemption as a possible defence to Article 101(1).

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<sup>947</sup> Lee (n 943) 1287.

<sup>948</sup> Ibid.

<sup>949</sup> *Bosman* (n 81) at [137].

<sup>950</sup> Ibid.

<sup>951</sup> *Gebhard* (n 940). Summary para 3.

<sup>952</sup> Ibid.

<sup>953</sup> Ibid.

<sup>954</sup> Ibid.

<sup>955</sup> Ibid

The ECJ has used the ruling in *Gebhard*<sup>956</sup> to allow sporting bodies to have autonomy in the organisation of their competitions. In *Deliège*,<sup>957</sup> the ECJ held that ‘selection criteria in judo based on a limit to the number of national participants in an international competition does not constitute a restriction on the freedom to provide services’.<sup>958</sup> Similarly, in the case of *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Federation Royale Belge des Societes de Basket-ball ASBL* (*Lehtonen*),<sup>959</sup> the ECJ held that it was acceptable for sporting bodies to have ‘transfer windows’ thus restricting player mobility when it could be shown that such restrictions were necessary for the operational running of the competition. The ECJ made it clear, however, that ‘in order to be justified, rules of this type defined by sporting organisations may not go beyond what is necessary to achieve the legitimate aim pursued’.<sup>960</sup> In this case it was necessary for the proper functioning of the competition in that the ‘transfer window’ helped to ensure the equity and balance of the competition.

The final case to consider is *Bernard*<sup>961</sup> which related to the impact of training compensation schemes upon Article 45 of the TFEU.<sup>962</sup> The court reaffirmed the point raised in *Bosman* that the recruitment and training of young players was a legitimate objective of importance. However, the ECJ made it clear that any compensation in this respect had to be related to the actual costs of training, which was not the case in *Bernard* since it linked the payment to the

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<sup>956</sup> Ibid.

<sup>957</sup> Cases 51/96 and C-191/97, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97)* [2000] ECR I-02549 (*Deliège*).

<sup>958</sup> Robert Siekmann, ‘The Specificity of Sport: Sporting Exceptions in EU Law’ (2012) *Zbornik radova Pravnog fakulteta u Splitu* <[https://www.pravst.unist.hr/dokumenti/zbornik/2012106/zbornik/2012106\\_zb201204\\_697.pdf](https://www.pravst.unist.hr/dokumenti/zbornik/2012106/zbornik/2012106_zb201204_697.pdf)>. See also *Deliège* (n 957) at [69]. This case related to the free movement of services rather than people but the European Court of Justice has treated them in a similar manner. The Court ruled: ‘Sports rules requiring professional or semi-professional athletes or persons aspiring to take part in a profession or semi-professional activity to have been authorised or selected by their federation in order to be able to participate in a high-level international sports competition, which does not involve national teams competing against each other, does not in itself, as long as it derives from a need inherent in the organisation of such a competition, constitute a restriction on the freedom to provide services prohibited by Article 59 of the treaty’ (now, after amendment, Article 49 EC).

<sup>959</sup> Case 176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Federation Royale Belge des Societes de Basket-ball ASBL* [2000] ECR I-2681 (*Lehtonen*).

<sup>960</sup> Siekmann (n 958) 713.

<sup>961</sup> Case C-325/08, *Olympique Lyonnais SASP v Oliver Bernard and Newcastle UFC* [2010] ECR I-02177.

<sup>962</sup> Siekmann reveals the outcome of the Court’s decision when he states: ‘According to the Court, Article 45 TFEU does not rule out schemes which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of the training period, a young player signs a professional contract with a club in another Member State, on condition that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it.’ See Siekmann (n 958) 712.

potential damage suffered by the club. However, the court did confirm the principle that training costs could be calculated on the ‘player factor’ which is based on the number of players that normally need to be trained to produce one professional player.<sup>963</sup>

As far as the FFP Regulations are concerned, it is apparent that any breach of Article 45 can only occur indirectly. The breakeven requirement does not prevent any footballer working in another State, although the requirement that the clubs spend no more than they earn could lead to that possibility if a club, in endeavouring to meet the breakeven requirement, was unable to buy a player or afford her or his wages. Flanagan acknowledges this issue stating that:

There remains an empirical question to answer as to whether FFP would in fact prohibit free movement of workers. It seems a counter-intuitive position to suggest that prohibiting long-term loss making would restrict free movement of workers. It seems a counter-intuitive position to suggest that prohibiting long-term loss making would restrict free movement of workers any more than a large multinational company choosing to downsize restricts movement of workers. The restriction does not emanate from the rule per se, rather by the size of the club’s turnover; players are no more restricted from moving between clubs by FFP than this author is denied a Ferrari by his credit rating.<sup>964</sup>

Although Flanagan makes a reasonable point, the European Court of Justice is unlikely to dismiss the application of Article 45 to the FFP in this generalised manner, preferring to follow the precedent which it has set for these matters by using the *Gebhard* ruling. Lindholm considers the issue through the conditions applied in *Gebhard*, acknowledging that the FFP Regulations would be seen as pursuing a legitimate aim but would struggle to overcome the proportionality condition. He looks at the latter through the overinvestment theory and argues that empirical and theoretical support for this theory is not present. He maintains that ‘the empirical evidence is inconclusive and cannot support the claim that clubs are incapable of refraining from overspending without the Financial Fair Play rules’.<sup>965</sup> From a theoretical perspective, Lindholm maintains that ‘existing research points out factors that cause teams to

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<sup>963</sup> Siekmann (n 958) 713.

<sup>964</sup> Flanagan (n 12) 154.

<sup>965</sup> Lindholm (n 167) 207.

engage in destructive behaviour. However, research does not prove that regulatory intervention, such as the Financial Fair Play rules, is necessary to correct it.<sup>966</sup>

Stroucken puts forward a different view, stating that ‘sporting rules constituting an obstacle to free movement of workers can be objectively justified’.<sup>967</sup> He argues that the test of objective justification (the conditions used in *Gebhard*) functions similarly to the ancillary restraint exemption in *Wouters* and seeks to apply the latter to the FFP Regulations.<sup>968</sup> Stroucken, therefore, considers whether the objectives of the FFP Regulations are non-discriminatory and legitimate, whether the restrictions are necessary to obtain the legitimate objectives and whether the restrictions are proportional and reasonable, with no other less restrictive alternatives available that could achieve a similar outcome.<sup>969</sup> He acknowledges that the answers to each condition are, by no means, obvious, but maintains that the FFP Regulations would meet the objective justification required to make Article 45 not applicable to them.<sup>970</sup>

Therefore, the commentators are at variance about whether the FFP Regulations meet the requirements of Article 45. Their differing views tend to support the apparent approach adopted by the ECJ which is that each case needs to be considered on its own particular facts. Nonetheless, it appears the FFP Regulations meet the conditions used in the *Gebhard* case and therefore it is unlikely that the ECJ would hold them to breach of Article 45. This will be considered further in Chapter 8.

### 6.10 Conclusion

The consensus of the various commentators is that the FFP Regulations are anti-competitive and breach Article 101 of the *TFEU*. The issue which then arises is whether one of the exemptions to that Article can be applied to the FFP Regulations. The block exemption and the De Minimis rule exception, which have the requirement of 30% and 10% market share ceilings respectively, are unlikely to apply because the market share which UEFA has in relation to European football is greater than those ceilings. Further, the commentators generally are of the opinion that UEFA will not be able to gain an exemption under Article 101(3). For differing reasons they take the view that any economic efficiencies generated by the FFP Regulations do not outweigh their deficiencies. The surviving possibility is the

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<sup>966</sup> Ibid 208.

<sup>967</sup> Andreas Stroucken, ‘UEFA Financial Fair Play: the savior of football or the road to the next Bosman ruling?’ (Masters Thesis, University of Lund, 2013) 27.

<sup>968</sup> Ibid 28.

<sup>969</sup> Ibid 28–32.

<sup>970</sup> Ibid 35.

ancillary restraint (*Wouters*) exemption which appears slightly more promising. Jemson and Flanagan suggest that it would apply, but the remaining commentators, who form a majority, are of the opinion that it would not. Overall, the view of the majority is that the FFP Regulations breach Article 101(1) and that the two exemptions will not apply. However, that majority view is likely to be incorrect as it appears that UEFA can rely on both the Article 101(3) and the ancillary restraint exemptions because the financial benefits of the FFP Regulations outweigh the restrictions imposed and because the ancillary restraint exemption will apply to the FFP Regulations. This will be considered further in Chapter 9 when a more detailed examination of the exemptions will be conducted.

In regard to Article 102, Jemson and Lindholm take the view that the FFP Regulations do not breach it, although it is conceded that Kaplan takes a contrary view. However, it is likely that Jemson and Lindholm are correct because UEFA does not appear to abuse its position.

There is a difference in opinion about Article 45 among the commentators, with Flanagan and Stroucken suggesting that the FFP Regulations would pass the three conditions of the *Gebhard* test, but Lindholm taking the view that they would fail the proportionality condition. It is likely that Flanagan and Stroucken are correct as it appears that the FFP Regulations meet the requirements of the *Gebhard* test.

In summary, there is no agreed view amongst the commentators about the validity of the FFP Regulations in relation to Articles 101, 102 and 45. Opinions are divided in respect of Articles 45 and 102, although the majority view appears to be that the FFP Regulations do not breach these provisions. The commentators are generally agreed that the FFP Regulations breach Article 101(1) but there are mixed opinions as to whether UEFA may be able to rely on the ancillary restraint exemption.

The legal position of the FFP Regulations in relation to the ECL will be examined in greater detail when answering thesis questions two and three in Chapters 8 and 9, respectively.

## CHAPTER 7: THE FINANCIAL FAIR PLAY (FFP) REGULATIONS AND THE OBJECTIVES AND VALUES OF UEFA

### 7.1 Introduction

This chapter will answer the first thesis question: Do the FFP Regulations fulfil the objectives and align with the values of UEFA? Three main areas will be examined. First, consideration will be given to the specific objectives of the FFP Regulations and whether they have been met. This will include looking at the criticisms of the FFP Regulations and the introduction of the voluntary agreement. Secondly, the FFP Regulations in relation to UEFA's general objectives contained in its Statutes and its values will be examined to see if the FFP Regulations align with them. Thirdly, the area of governance in relation to the FFP Regulations will be scrutinised. This aspect is important because UEFA, as a representative body, must operate with integrity and reasonableness, treating all parties with whom it has dealings with fairness and equality.

### 7.2 UEFA's Specific Objectives in Respect of the FFP Regulations

The FFP Regulations were introduced to deal with the financial problems pervading European football in the early years of the 21<sup>st</sup> century. In 2009, UEFA reported that out of 655 European football clubs more than 50% had run at a loss over the previous year.<sup>971</sup> In addition, some clubs had large outstanding debts including sums due to other clubs for transfer fees. Some clubs, like Portsmouth and Rangers, had entered administration.<sup>972</sup> Player wages were continuing to rise and this was not helped by new wealthy owners being prepared to pay larger salaries to obtain the best players.<sup>973</sup> In the Premier League, for instance, player wages rose 1,508% from 1992 to 2010, whereas wages generally only increased by 186%.<sup>974</sup> There was also concern at the heavy debt levels incurred by some clubs as the result of new owners borrowing heavily to buy the club and then using the club's future earnings to pay the interest

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<sup>971</sup> Andrew Nixon, 'Daniel Striani and UEFA's Financial Fair Play regulations: the new Bosman?' (1 March 2015) *LawInSport* <<https://www.lawinsport.com/blogs/sheridans/item/daniel-striani-and-the-uefa-ffp-regulations-the-new-bosman>>. See also Andrew Wenger 'UEFA Financial Fair Play' *Soccer Politics* (Web Page, 27 December 2012) <<https://sites.duke.edu/wcwp/2012/12/27/uefa-financial-fair-play/>>.

<sup>972</sup> Dunbar (n 574) 2. Rangers entered administration in February 2012 and subsequently entered liquidation on 31 October 2012. See Graham Spiers, 'How the mighty Glasgow Rangers have fallen', *The Guardian* (online at 18 January 2015) <<https://www.theguardian.com/football/2015/jan/18/how-the-mighty-glasgow-rangers-have-fallen>>.

<sup>973</sup> Flanagan (n 12) 162.

<sup>974</sup> Ibid 160. Flanagan obtained the information from 'Highlights, Deloitte Annual Review of Football Finance', *Deloitte* (Web Page, 2012) <[www.deloitte.com](http://www.deloitte.com)>.



on the borrowings.<sup>975</sup> UEFA considered that '[t]here was the potential for financial chaos to arise if efforts were not made to remedy the position'.<sup>976</sup>

Against that background the specific objectives of the FFP Regulations are:

- a) to improve the economic and financial capability of the clubs, increasing their transparency and credibility;
- b) to place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with employees, social/tax authorities and other clubs punctually;
- c) to introduce more discipline and rationality in club football finances;
- d) to encourage clubs to operate on the basis of their own revenues;
- e) to encourage responsible spending for the long-term benefit of football; and
- f) to protect the long-term viability and sustainability of European club football.<sup>977</sup>

The objectives can be divided into three groups: shorter term aims, medium term targets and longer-term goals. Objectives (b) and (d) are designed to ensure that clubs pay their debts within a reasonable time and spend no more than they earn.<sup>978</sup> These short-term aims are supported by the regulations which impose strict rules on the clubs paying their debts and abiding by the breakeven principle.<sup>979</sup> Medium term targets such as achieving better financial discipline and rationality from clubs and to encourage clubs to spend no more than they earn are reflected in objectives (a) and (c). Longer term goals to encourage responsible spending and to protect of the viability of European football are contained in (e) and (f).<sup>980</sup>

There was, understandably, some scepticism about how successful the FFP Regulations would be, but, in hindsight, it would be difficult to be too critical. Debt levels have been substantially reduced and the financial position of the vast majority of European football clubs is better

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<sup>975</sup> David Conn, 'Cost of Glazers' takeover at Manchester United reaches £500m', *The Guardian* (online at 23 February 2012) <<https://www.theguardian.com/sport/david-conn-inside-sport-blog/2012/feb/22/manchester-united-glazers-debt>>. See also Paul Gardner, 'A Leverage Buy Out, How LFC has fallen victim to a cruel financial instrument', *Red and White Kop* (Web Page, 21 July 2010) <<https://www.redandwhitekop.com/forum/index.php?topic=260882.0>>. This type of financial arrangement is called a 'leveraged buyout'.

<sup>976</sup> Dunbar (n 574) 2.

<sup>977</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018 edition) art 2(2).

<sup>978</sup> *Ibid* art 2(b) and 2(d).

<sup>979</sup> *Ibid* arts 65 and 66 and also arts 58-64.

<sup>980</sup> *Ibid* art 2(a), 2(c), 2(e) and 2(f).

now than before the FFP Regulations were introduced.<sup>981</sup> UEFA revealed that ‘European clubs’ losses fell by two-thirds between 2011 and 2014 from €1.67bn to €436m’.<sup>982</sup> Overdue payables stood at €57 million in 2011 but by June 2015 had reduced to €5 million, a reduction of approximately 90%.<sup>983</sup> Debt generally has tended to reduce substantially with UEFA revealing that the combined net debt of Europe’s top-division clubs has decreased from 65% of revenue in 2010 to 40% of revenue in 2018.<sup>984</sup> The breakeven requirement has also had an effect with record operating profits of €1,386 million in 2017.<sup>985</sup> The impact of the FFP Regulations can be seen by contrasting the combined operating losses of Europe’s clubs in the four year period from 2009 to 2012 of €1 billion to the €3.6 billion operating profit for the four years from 2015 to 2018.<sup>986</sup> Operating costs, with revenues increasing significantly, have decreased markedly from 39% in 2010 to 33% in 2018.<sup>987</sup> Revenue has recently tended to grow at a faster rate than wages with an 8.9% growth in revenue and 6.7% growth in wages in 2017,<sup>988</sup> although in 2018 revenue growth dropped to 4.9% as wage growth spiked to 9.4%.<sup>989</sup> In 2011, revenue growth was 3.2% and wage growth 5.2%.<sup>990</sup> The percentage of club revenue spent on wages has reduced from 65.2% in 2012 to 63.9% in 2018, with a low of 61.3% in 2017.<sup>991</sup>

The general reduction in debt and, in particular, the decline in the overdue payables suggests that the FFP Regulations relating to debts and the breakeven requirement have done what was required. The financial capability of clubs has improved, encouraging greater transparency and introducing more discipline to club finances, which has led to the longer-term benefits and viability of European football. The FFP Regulations appear to have provided protection for the integrity of UEFA’s competitions with clubs being financially sound and able to fulfil their competition commitments. Commenting generally on the situation, Taormina notes that

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<sup>981</sup> The figures produced in this paragraph are sourced from UEFA and are the latest currently available as at December 2020.

<sup>982</sup> UEFA, ‘Positive Financial Fair Play results’, *UEFA.com* (Web Page, 30 October 2015) <<https://www.uefa.com/insideuefa/protecting-the-game/news/0253-0d809c3eee6c-273fb9143e69-1000--positive-financial-fair-play-results/>>.

<sup>983</sup> Squire Patton Boggs, ‘Your guide to overdues payables in football’, *Sports Shorts* (Web Page, 31 March 2017) <<https://www.sports.legal/2017/03/your-guide-to-overdue-payables-in-football/>>.

<sup>984</sup> UEFA (n 807) 126.

<sup>985</sup> UEFA, ‘The European Club Footballing Landscape – Club Licensing Benchmarking Report Financial Year 2017’, *UEFA.com* (Web Page, 2017) 93 <[https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/59/40/27/2594027\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/59/40/27/2594027_DOWNLOAD.pdf)>.

<sup>986</sup> UEFA (n 807) 110.

<sup>987</sup> *Ibid* 104.

<sup>988</sup> UEFA (n 985) 71.

<sup>989</sup> UEFA (n 807) 84.

<sup>990</sup> UEFA (n 985) 71.

<sup>991</sup> UEFA (n 807) 84.

the better financial results ‘show that FFP has improved football club efficiency and independence’.<sup>992</sup> He also acknowledges that improved operating profits allow clubs ‘to continue independently financing their operations while also participating in the transfer market’.<sup>993</sup> In this, Taormina is correct. The FFP Regulations have brought financial stability to European football.

Although UEFA’s results appear favourable and have not been challenged by commentators, nor has there been a universal acknowledgement of the success of the FFP Regulations. From their inception they received criticism. Vopel, for instance, considered that there was no need for regulation,<sup>994</sup> whilst other critics, including Lindholm, were of the view that there were better ways of achieving financial stability and competitive balance than the FFP Regulations and its main component, the breakeven requirement.<sup>995</sup> Some commentators suggested that the FFP Regulations were incorrectly named because they were far from fair. Szymanski stated the rules do ‘not offer Fair Play at all’.<sup>996</sup> Flanagan commented that ‘[r]ather than promote “fairness” it can be argued that FFP entrenches an existing hegemony’,<sup>997</sup> and ‘nor does it (FFP) represent the most natural use of the word “fair”’.<sup>998</sup>

These criticisms are not without some justification but some can be challenged. It is acknowledged that there had not been major financial disruption among European football clubs when the FFP Regulations were introduced<sup>999</sup> and the Global Financial Crisis may also have had a temporary effect on the situation<sup>1000</sup> but, nonetheless, club debt levels were

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<sup>992</sup> Taormina (n 771) 1290. He notes a large improvement in the operating profits since the inception of the FFP, from a loss of €830 million for the three years 2010–2012 to a €2.3 billion profit for the three year period 2014–2016. See also UEFA, ‘The European Club Footballing Landscape Club Licensing Benchmarking Report Financial Year 2016’, *UEFA.com* (Web Page) 101 <[www.uefa.com](http://www.uefa.com)>.

<sup>993</sup> *Ibid.*

<sup>994</sup> See, eg, Henning Vopel, ‘Do we really need Financial Fair Play in European Club Football? An Economic Analysis’ (2011) *CESifo DICE Report* 3/2011 54, 59.

<sup>995</sup> See, eg, Johan Lindholm, ‘The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play’ (2011) 12(2) *Texas Review of Entertainment & Sports Law* 207, 208–211. See also Valerie Kaplan, ‘UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications’ (2015) 29(4) *Emory International Law Review* 799, 857. See also Tom Serby, ‘The state of EU sports law: lessons from UEFA’s “Financial Fair Play” regulations’ (2016) 16 *International Sports Law Journal* 37, 45.

<sup>996</sup> Stefan Szymanski, ‘Fair is Foul: A Critical Analysis of UEFA Financial Fair Play’ (2014) 9 *International Journal of Sport Finance* 218, 227.

<sup>997</sup> Flanagan (n 12) 162.

<sup>998</sup> *Ibid.* 164.

<sup>999</sup> Notwithstanding this, there were 66 insolvency events in the three lower leagues of English football between 1982 and 2010. In Italy, 103 clubs from the four top divisions collapsed between 2002 and 2012, and 22 clubs in Spain between 2003 and 2012. See Flanagan, above n 12, 167 for more details.

<sup>1000</sup> The GFC seems to have played its part in Portsmouth’s difficulties with its owner, Gaydamak, unable to continue funding the club after the GFC. See David Conn, ‘What’s gone wrong at Portsmouth? Ten reasons for the demise of a club’, *The Guardian* (online at 6 February 2010) <<https://www.theguardian.com/football/2010/feb/05/portsmouth-balram-chainrai-sacha-gaydamak>>.

constantly increasing and players' wages were continuing to rise with the position likely to become worse unless action was taken. It can, therefore, be argued that the introduction of the FFP Regulations was partly pre-emptive, to prevent matters from becoming worse.

A major criticism levelled at UEFA is that the FFP Regulations do not achieve competitive balance, and maintain the financial differential between the wealthy and the poorer clubs by not allowing investment and making the clubs spend no more than they earn.<sup>1001</sup> However, this fails to take into account the objectives of the FFP Regulations which focus on the financial stability of the clubs. It was never their objective to seek competitive balance. Therefore, at least in that respect, the FFP Regulations have been judged against an objective that was never part of their aim to achieve.

Bearing in mind that competitive balance is not the objective of the FFP Regulations, the use of the term 'fair play' does seem inappropriate.<sup>1002</sup> At best, the FFP Regulations allow the status quo to continue with the wealthy clubs continuing to dominate the poorer ones. However, UEFA used the term 'fair play' for ethical reasons. UEFA introduced its overdue payables provisions because it considered that it was unfair for a club to field players which it did not or could not pay.<sup>1003</sup> It also considered it an unfair advantage for a club to field a player whose transfer fee had not been paid.<sup>1004</sup> Similarly, with the breakeven requirement, UEFA saw the use of rich benefactors' money as unethical because the funding was provided independently of the 'sporting success, the tradition and reputation of the club'.<sup>1005</sup> The FFP Regulations have been built around this ethical approach with only revenue generated from football-related activities being taken into account. Relevant revenue does not include investment money from wealthy benefactors and strict market value applies to sponsorship agreements.<sup>1006</sup> Only legitimate operating expenses are permitted with limited exceptions

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<sup>1001</sup> Flanagan (n 12) 162. See also Szymanski (n 1212) 227. See also, eg, Markus Sass, 'Long-term Competitive Balance under UEFA Financial Fair Play Regulations' (Working Paper No 5/2012 Faculty of Economics and Management University of Magdeburg, 2012) 10. See also Andrew Wenger, 'UEFA Financial Fair Play', *Soccer Politics* (Web Page, 27 December 2012) <<https://sites.duke.edu/wcwp/2012/12/27/uefa-financial-fair-play/>>. See also Stephen Hornsby, 'UEFA FFPR settlements, Striani complaint and EU law' (June 2014) *World Sports Law Report* 8, 10.

<sup>1002</sup> The word 'initially' has been included because when the FFP Regulations were first drafted there was no provision for any equity investment. In 2015, this was changed to allow some investment via the voluntary agreement process.

<sup>1003</sup> Dunbar (n 574) 3.

<sup>1004</sup> *Ibid.*

<sup>1005</sup> J Christian Muller, Joachim Lammert, and Gregor Hovemann, 'The Financial Fair Play Regulations of UEFA: An Adequate Concept to ensure the Long-term Viability and Sustainability of European Club Football?' (2012) 7 *International Journal of Sport Finance* 117, 123.

<sup>1006</sup> Dunbar (n 574) 4.

relating to youth development, construction and maintenance of infrastructure and community development activities allowed.<sup>1007</sup>

In addition, much of the criticism of the FFP Regulations occurred at an early stage in their existence before any results of their effects were known and, even more significantly, before their major revision in 2015 when voluntary agreements became permissible.<sup>1008</sup> The voluntary agreement potentially allows wealthy owners to invest in their clubs if UEFA approves the proposed business plan, all amounts of investment over the breakeven requirement are guaranteed by an equity participant and the club is able to show it will be able to return to the breakeven requirement once the voluntary agreement ends.<sup>1009</sup> Initially, the voluntary agreement could run for a period of four years but this was changed in 2018 to ‘several years’ giving an owner a potentially longer period in which to carry out the proposed business plan.

From UEFA’s perspective, the introduction of the voluntary agreement was a softening of its approach, and, in particular, its ethical position that investment money should only come from football, rather than wealthy owners. In this respect, UEFA acted in a pragmatic and practical manner to allow supervised equity investment and to counter the description in *Striani* that the FFP Regulations were, *inter alia*, a ‘fossilization of the existing market structure’.<sup>1010</sup> Although UEFA’s ethical reasoning may have been compromised to a degree, the main objective of the FFP Regulations, the financial stability for European football and its clubs, is still accommodated. UEFA is able to show that the initial introduction of the FFP Regulations steadied the financial situation sufficiently for it to be able to extend them to allow the use of supervised investment money. The relaxation of the FFP Regulations seemed to have an immediate effect, with nine clubs in 2016 being bought by foreign owners.<sup>1011</sup>

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<sup>1007</sup> Ibid. These exceptions are seen as ethically acceptable as they are encouraging the sustainable and long-term growth of the club, as opposed to sums provided to buy players with the view to obtaining short-term playing success for the club.

<sup>1008</sup> Clinton Long, ‘Promoting Competition or Preventing it? A Competition Law Analysis of UEFA’s Financial Fair Play Rules’ (2012) 23 *Marquette Sports Law Review* 75, 99. See also, eg, Jemson, (n 766) 47-48 and Kaplan (n 763) 837.

<sup>1009</sup> *UEFA Club Licensing and Financial Fair Play Regulations Edition 2018* Annex X11: Voluntary agreements for break-even requirement, 102–103.

<sup>1010</sup> Stefan Szymanski, ‘Challenge to Financial Fair Play launched’, *Soccernomics* (Web Page, 2013) <<https://www.soccernomics-agency.com/?p=454>>.

<sup>1011</sup> Oskar van Maren, ‘UEFA’s Financial Fair Play Regulations and the Rise of Football’s 1%’, *Asser International Sports Law Centre* (Blog Post, 2017) <<https://www.asser.nl/SportsLaw/Blog/post/uefa-s-financial-fair-play-regulations-and-the-rise-of-football-s-1>>.

There is only minimal data available about the use of voluntary agreements, which is perhaps unsurprising as UEFA and clubs involved are probably not keen to discuss individual club finances in the public arena. Nonetheless, if the voluntary agreement mechanism was not working reasonably effectively, one would expect this information to be publicly disclosed by disgruntled clubs. The only example discovered was that of AC Milan, which was refused a voluntary agreement by the CFCB in 2017, on the grounds that there were ‘uncertainties in relation to the refinancing of the loans to be paid back in October 2018 and the financial guarantees provided by the main shareholder’.<sup>1012</sup> The proposed takeover by Amanda Staveley’s syndicate of buyers of premier league club, Newcastle United, was a prime example of where the voluntary agreement could have been used in a positive manner. The syndicate included the Public Investment Fund of Saudi Arabia with assets of approximately €300 billion. With investment money available, it is likely that the syndicate would have sought a voluntary agreement from UEFA.<sup>1013</sup> Although the voluntary agreement could not be used in the Newcastle United example as the takeover did not proceed, fellow Premier League club Burnley has just been taken over by American owners, ALK Capital.<sup>1014</sup> It may be that Burnley’s new owners will seek a voluntary agreement with UEFA.

Generally, however, the introduction of the voluntary agreement has reduced the criticism of the FFP Regulations because it has provided the opportunity for ownership investment. That investment is monitored by UEFA, thus creating no threat to the financial stability of European football and fulfilling the specific objectives of the FFP Regulations.

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<sup>1012</sup> UEFA, ‘AC Milan request for voluntary agreement rejected’, *UEFA.com* (Web Page, 15 December 2017) <<https://www.uefa.com/insideuefa/protecting-the-game/news/0240-0f8e5a561875-f0233516e57b-1000--ac-milan-request-for-voluntary-agreement-rejected/>>.

<sup>1013</sup> ‘Newcastle United takeover: Jim White reveals £300m takeover by Saudi Consortium DONE and just waiting on Premier league approval’, *Talksport* (Web Page, 15 April 2020) <<https://talksport.com/football/694742/newcastle-united-takeover-saudi-group-done/>>. See also SunSport, ‘Newcastle finally gets green light for \$550 million takeover’, *Fox Sports* (Web Page, 22 May 2020) <<https://www.foxsports.com.au/football/premier-league/premier-league-newcastle-united-takeover-deal-approved-new-owner-mike-ashley-epl/news-story/cc6e9d8b2199d00c9ce311bbe16e62c2>>. The takeover consortium comprises the Public Investment Fund of Saudi Arabia (80%), the Reuben brothers (10%) and Amanda Staveley’s PCP Capital Partners (10%). See Michael Marsh, ‘Who are the Reuben brothers? Billionaires named in proposed Newcastle United takeover’, *The Chronicle* (online at 15 April 2020) <<https://www.chroniclive.co.uk/sport/football/football-news/newcastle-united-takeover-reuben-brothers-13547418>>. See also ‘Public Investment Fund of Saudi Arabia (PIF)’, *SWFI* (Web Page, 23 May 2020) <<https://www.swfinstitute.org/profile/598cdaa60124e9fd2d05bc3b>>.

<sup>1014</sup> ‘American Investors ALK Capitals complete takeover of Premier League side Burnley’, *Sporting Life* (Web Page, 29 December 2020) <<https://www.sportinglife.com/football/news/burnleys-takeover-completed/187935>>.

### 7.3 UEFA's General Objectives and its Values

UEFA's 15 general objectives are contained in Article 2(1) of its Statutes.<sup>1015</sup> Article 2(2) provides that UEFA should seek to achieve its objectives by implementing any measures it deems appropriate, such as setting down rules, entering into agreements or conventions, taking decisions or adopting programmes.<sup>1016</sup>

Objectives (a), (b) and (c) are general in nature but important in that they emphasise the stewardship role of UEFA as looking after and promoting football at all levels from the elite clubs in the top competitions to football at the grass roots level.<sup>1017</sup> Organising football competitions is a main task of UEFA and this is covered in objective (d).<sup>1018</sup> This task also provides UEFA with its income, so objective (d) also links in with objective (h) which requires UEFA to redistribute revenue generated from football in accordance with the principles of solidarity with the aim of supporting the grassroots of the game.<sup>1019</sup> Several other areas are particularly covered in the objectives including: looking after the interests of its main patrons, the National Associations, as set out in (j) and (o); and maintaining good relations with FIFA as covered in (m) and (n).<sup>1020</sup> The remaining objectives fit into two groups: objectives (e), (f) and (g), which require UEFA to ensure European football functions and behaves ethically; and objectives (i), (k) and (l) which require UEFA to promote unity and ensure the interests of all stakeholders involved in European football are properly taken into account.<sup>1021</sup>

The FFP Regulations can be clearly linked to these objectives in three key areas: UEFA's role in European football; its desire for unity and consensus; and its concern with ethical behaviour.

The FFP Regulations assist the attainment of these objectives by providing protection to UEFA's most important asset, its competitions. Part of the revenue from its competitions gives UEFA its income to support all levels of European football. Unity and consensus are vital to UEFA's success in this role and, by protecting its competitions, the FFP Regulations help to achieve this. Through its competitions, UEFA is able to maintain consensus and unity among its stakeholders. The competitions provide a goal for clubs and other stakeholders to

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<sup>1015</sup> *UEFA Statutes* (2020 edition) art 2(1).

<sup>1016</sup> *Ibid* art 2(2).

<sup>1017</sup> *Ibid* art 2(1)(a), 2(1)(b) and 2(1)(c).

<sup>1018</sup> *Ibid* art 2(1)(d).

<sup>1019</sup> *Ibid* art 2(1)(h).

<sup>1020</sup> *Ibid* art 2(1)(j), 2(1)(m), 2(1)(n) and 2(1)(o).

<sup>1021</sup> *Ibid* art 2(1)(e), 2(1)(f), 2(1)(g), 2(1)(i), 2(1)(k) and 2(1)(l).

focus on and also offer prize money to the successful clubs, as well as an opportunity for solidarity payments to clubs at the lower levels of the game.

Ethical behaviour, heavily represented in UEFA's objectives, was also an important reason behind the FFP Regulations. As discussed in Chapter 7.2, UEFA saw it as unfair that wealthy owners could bring success to their clubs simply by the provision of money. The ethical way for money to be earned was seen as being through gate receipts and sponsorship and this would vary from club to club.<sup>1022</sup> Larger revenue from these sources was seen as a reward for clubs, which had increased their incomes due to their successful performances in the past.<sup>1023</sup>

As also discussed in Chapter 7.2, ethical behaviour extends beyond owners simply providing funds to their clubs in the area of unpaid debts. If a club uses a player who it is unable to pay, it is gaining an unfair advantage against clubs that honour their players' contracts.<sup>1024</sup> A club adopting this approach is using inputs 'under false pretences and in doing so reaps unjust rewards'.<sup>1025</sup> In the same way, an unfair advantage happens if a club plays a player whose transfer fee has not been paid.<sup>1026</sup> The club is getting an unreasonable advantage in exactly the same way as a club does when it fields a suspended player.<sup>1027</sup> When this type of conduct occurs, the 'integrity of the competition' is being compromised.<sup>1028</sup>

Ethical behaviour is a dominant requirement in UEFA's objectives and played a major part in the development of the FFP Regulations. The importance of ethics also appears in UEFA's values as do the other components, which have just been discussed, including UEFA's leadership role, its use of solidarity payments and its aim for unity. The same points made in respect of the objectives apply also to the values. It is not surprising that the objectives and values are similar in nature. First, it reveals UEFA's consistency in this area and secondly, the values are basically a reiteration of UEFA's objectives placed in a popular form to appeal to the general public.

Since the values were drafted more recently than the objectives, there is specific mention in value 8 of financial fair play and regularity of competitions. As discussed in Chapter 4.4, UEFA states that it is seeking fair play both on and off the pitch and the mention in the value

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<sup>1022</sup> Dunbar (n 574) 4.

<sup>1023</sup> Ibid.

<sup>1024</sup> Ibid 3.

<sup>1025</sup> Muller, Lammert and Hovemann (n 1005) 123.

<sup>1026</sup> Dunbar (n 574) 3.

<sup>1027</sup> Ibid.

<sup>1028</sup> Muller, Lammert and Hovemann (n 1005) 123.



title of ‘regularity of competitions’ stresses the importance of the UEFA competitions and the need for their consistency if UEFA is to achieve its aims. The FFP Regulations cover the off-field fair play that UEFA is seeking.

In essence, the FFP Regulations are an embodiment of UEFA’s objectives and values. Their main purpose was to bring financial stability to the football clubs and thus protect UEFA’s competitions, which are of key importance to UEFA’s chief aim of looking after European football. Unity and consensus are vital to UEFA’s well-being as an organisation and were at risk when the FFP Regulations were being introduced. However, unity and consensus were achieved due to UEFA’s efforts on a number of fronts. The footballing stakeholders were appeased because the changes envisaged were relatively minor and did not require major changes to the structure of European football. The changes basically maintained the status quo among the clubs. UEFA also ensured it had the support of all its main stakeholders before it proceeded with the FFP Regulations. The clubs and other stakeholders were given a long period of adjustment before the FFP Regulations took effect. UEFA also made certain it had the support of the European Commission for the FFP Regulations. As already discussed in Chapter 4.5, this was initially achieved in 2012<sup>1029</sup> and was followed by the signing of a cooperation agreement between UEFA and the European Commission in 2014,<sup>1030</sup> which was renewed in 2018.<sup>1031</sup> UEFA also used the ethical nature of the FFP Regulations to gain support for them, although it was a necessary requirement for UEFA to step back from that position to a degree by introducing the voluntary agreement in 2015.

The importance which UEFA attached to its objectives and values relating to unity and consensus also assisted it in dealing with issues that arose after the introduction of the FFP Regulations. The support of the main stakeholders and the European Commission was helpful when Striani commenced proceedings against UEFA. It gave credence to the FFP Regulations and was of significance to UEFA from a public perception perspective when the legal proceedings were taking place. In the circumstances, UEFA and its FFP Regulations did not come under extreme public scrutiny with the matter being allowed to take its legal course without a barrage of speculation and criticism. Without the unity of the main stakeholders the situation may have been different.

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<sup>1029</sup> UEFA (n 496) 1.

<sup>1030</sup> UEFA (n 497) 1.

<sup>1031</sup> UEFA (n 498) 1.

The objectives of unity and consensus have also been extremely important to UEFA in its relationship with the wealthy clubs. UEFA had been well-aware of the threat of losing these clubs to a breakaway competition for some time. As already discussed, in 1998, Media Partners sought to set up a new Super League and, in 2000, 14 major European clubs set up an interest group, the G14.<sup>1032</sup> This breakaway group had the potential to split European football and UEFA had to negotiate with it to keep the group of clubs within the UEFA family. Subsequently the ECA was formed and it was granted four seats on the Professional Football Strategy Council.<sup>1033</sup> In April 2017, the ECA was also given two seats on UEFA's Executive Committee.<sup>1034</sup> UEFA recognised the importance of keeping these top clubs within the fold. This can even be seen in the introduction of the breakeven principle as the principle was originally developed by the G14 group which had discussed the idea of restricting wages to a maximum of 70% of a club's turnover.<sup>1035</sup> Keeping the top clubs within the UEFA family is important for UEFA competitions. Losing the top clubs would have a disastrous impact on UEFA's finances and would prevent it meeting its objectives to represent and assist all levels of football in Europe.<sup>1036</sup> Further, European football would not want to experience the problems which a division in the administration would cause, as European basketball has suffered with the dispute between the International Basketball Federation (FIBA) and FIBA Europe on the one side and Euroleague Commercial Assets SA on the other side.<sup>1037</sup>

To achieve its stewardship mandate of looking after all aspects of European football, UEFA needs the support of the top clubs. Their participation assists in the success of UEFA's competitions, with some of the revenue being used to promote and support grassroots football. Without these top clubs, UEFA's task of caring for the interests of football would be difficult to achieve. In addition, the threat of a breakaway competition is not an idle threat and is an ongoing issue. The COVID-19 pandemic has inspired new interest in a Super League proposal

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<sup>1032</sup> Vieli (n 7) 124.

<sup>1033</sup> *UEFA Statutes* (2020 edition) art 35(1).

<sup>1034</sup> *Ibid* art 21(1).

<sup>1035</sup> 'Players and Gentlemen. A new deal to control soaring costs. But will it stick?', *The Economist* (online at 7 November 2002) <<https://www.economist.com/business/2002/11/07/players-and-gentlemen>>.

<sup>1036</sup> Taormina acknowledges that UEFA would be powerless to stop clubs from joining another competition and that '[l]ack of participation from Europe's elite clubs would presumably cause a decrease in UEFA's viewership and revenue and consequently, its dissolution'. See Taormina, above n 769, 1292.

<sup>1037</sup> Luke Milanovic, 'An overview of the dispute between FIBA and EuroLeague – Is there an end in sight?' (28 February 2018) *LawInSport* <<https://www.lawinsport.com/topics/item/an-overview-of-the-dispute-between-fiba-euroleague-is-there-an-end-in-sight>>. This dispute concerned 'the appropriate format in which basketball is organised at a European level' with both parties accusing the other of anti-competitive behaviour. The matter 'has already been litigated before a state court in Germany and both have filed complaints before the European Commission',

with Real Madrid's President, Florentino Perez, saying at his club's 2020 Annual General Assembly that he supported the concept and that 'Real Madrid played a part in the foundation of FIFA and the European Cup and the current model needs a reboot, as the impact of COVID-19 has demonstrated. Football needs new momentum and Real Madrid will be right there at the heart of it.'<sup>1038</sup> FIFA and UEFA have reacted strongly condemning the proposal and have threatened World Cup bans for footballers, who play in teams in the breakaway competition.<sup>1039</sup> The strong reaction from FIFA and UEFA may deter clubs from becoming involved, with Manchester United apparently distancing themselves from the proposals.<sup>1040</sup> However, Kerry Packer's World Series Cricket in the late 1970s<sup>1041</sup> and Rupert Murdoch's Super League challenge to the Australian Rugby League in the mid-1990s<sup>1042</sup> are examples of rival groups setting up competitions in conflict with the established provider. It will be interesting to see how matters develop in this area as UEFA is expected to reveal plans soon for its reform of the Champions League from 2024.<sup>1043</sup>

Overall, UEFA has remained committed to its objectives and values with the adoption, introduction and use of the FFP Regulations being a good example of this. UEFA's role in charge of European football is not an easy one but it has operated with care, diligence and foresight to ensure it looks after the interests of European football.

#### *7.4 Financial Fair Play (FFP) Regulations and Governance Issues*

As already discussed in Chapters 7.2 and 7.3, the FFP Regulations seem to align with the objectives and values of UEFA but the area of good governance warrants some consideration. UEFA has set up the CFCB as an independent body to enforce the FFP Regulations. The difficulty, however, is that there are always issues arising about the independence of a body

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<sup>1038</sup> Ollie Lewis, 'Aleksander Ceferin takes aim at Florentino Perez over controversial European Super League proposals as UEFA president claims Real Madrid chief "is only interested in today, not what tomorrow will be"', *Daily Mail* (online at 27 December 2020) <<https://www.dailymail.co.uk/sport/football/article-9090251/Aleksander-Ceferin-takes-aim-Florentino-Perez-controversial-European-Super-League-proposals.html>>.

<sup>1039</sup> Rob Draper and Nick Harris, 'Manchester United BACK AWAY from European Super League proposals after FIFA and UEFA closed ranks...as Premier League source slams closed-shop plans led by Juventus and Real Madrid as "deeply damaging to game"', *Daily Mail* (online at 27 January 2021) <<https://www.dailymail.co.uk/sport/football/article-9180073/Manchester-United-AWAY-European-Super-League-proposals.html>>.

<sup>1040</sup> *Ibid.*

<sup>1041</sup> Gideon Haigh, 'The Cricket War – The Story of Kerry Packer's World Series Cricket', *Wisden* (Web Page, 7 December 2017) <<https://wisden.com/stories/long-room/book-extract-the-cricket-war-the-story-of-kerry-packers-world-series-cricket>>.

<sup>1042</sup> NRL Operations, 'History of Rugby League', *NRL.com* (Web Page, viewed 27 January 2021) <<https://www.nrl.com/operations/history-of-rugby-league/>>.

<sup>1043</sup> Draper and Harris (n 1039) 2.

that has been set up by an organisation to administer its rules. While UEFA established the CFCB to administer the FFP Regulations independently, UEFA is still responsible for the salaries of those personnel enforcing its rules. As a result, there will always be a concern as to whether the body is truly independent.<sup>1044</sup> In these circumstances, it is crucial that transparency and openness are as manifest as possible in the conduct of the independent body, whilst acknowledging that the confidentiality of the clubs involved needs to be observed.

UEFA appears to meet the transparency and openness requirements in some areas, including the appointment of personnel to the CFCB, recusal, and the right of appeal, but there are other areas which are not specifically covered in the PR. These fields include the standard of proof, representation and recidivism. Interestingly, these topics are all included in the DR<sup>1045</sup> that apply to the CEDB, the body enforcing the CLR. In fairness to UEFA, Article 26 of the PR does state that '[i]n rendering its final decision, the adjudicatory chamber applies the UEFA Statutes, rules and regulations and, in addition, Swiss law'.<sup>1046</sup> However, from a transparency perspective more clarity would be helpful, and it would be sensible to extend the PR to fully cover all topics individually rather than to leave them to be covered by a 'catch-all' provision.

Another issue that requires consideration from a transparency and openness perspective is the valuation of sponsorship agreements. UEFA has experienced several difficulties with the valuation of sponsorship agreements, with some prominent clubs seeking ways to enhance their agreements in order to have more money to purchase new players and still meet the breakeven requirement. Manchester City and PSG are two clubs which have had ongoing disputes with UEFA over these issues.<sup>1047</sup> Both clubs entered settlement agreements with UEFA in 2014, in which they were fined,<sup>1048</sup> but both clubs have been involved in further disputes since. Manchester City recently avoided a two year ban from UEFA competitions following an appeal to CAS but was fined €10 million for obstructing CFCB's investigations.<sup>1049</sup> PSG escaped a potential penalty with CAS determining that UEFA's

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<sup>1044</sup> UEFA also provides the administration for the CFCB at UEFA headquarters. See PR (Edition 2019) art 11.

<sup>1045</sup> *UEFA Disciplinary Regulations* (Edition 2020) (DR).

<sup>1046</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) (PR) art 26.

<sup>1047</sup> Taormina sees the matter of related party sponsorship as being a major issue with the FFP and refers to the PSG and Manchester City cases as examples. See Taormina, above n 769, 1317–1320.

<sup>1048</sup> Keith Weir, 'PSG, Man City face squad caps, fines over FFP', *Reuters* (Web Page, 6 May 2014) <<https://www.reuters.com/article/uk-soccer-uefa-ffp/psg-man-city-face-squad-caps-fines-over-ffp-idUKKBN0DM0LR20140506>>. See also 'Financial Fair Play: Manchester City and PSG Punished', *CNN* (Web Page, 16 May 2014) <<http://edition.cnn.com/2014/05/16/sport/football/financial-fair-play-uefa-football/index.html>>.

<sup>1049</sup> Sky Sports, 'Manchester City to play in Champions League next season after European ban overturned', *Fox Sports* (Web Page, 13 July 2020) <<https://www.foxsports.com.au/football/uefa-champions-league/epl->

decision to review PSG's case must be reversed because it had failed to make its decision to review within the time limit period of 10 days.<sup>1050</sup>

Sims has suggested that UEFA should take a number of measures to assist with the valuation issue.<sup>1051</sup> He is of the opinion that harsher penalties should be imposed on repeat offenders, on the basis that, if they are only fined, it may be financially sensible for a club to commit an offence and pay the fine, because the club is likely to be better off financially by taking this course of action.<sup>1052</sup> Sims also suggests the introduction of a new rule to prevent clubs from registering any player bought in the financial year where a club is found to have breached the FFP Regulations.<sup>1053</sup> This would certainly make a club think carefully about deliberately breaching the FFP Regulations. Sims' views are pertinent as it is important that repeat offenders receive harsher penalties, but it can also be argued that it would be equally beneficial for UEFA to produce guidelines setting out suggested penalties for possible offences. This would promote transparency and give clubs a clear indication of likely penalties if they were to breach the FFP Regulations. In addition, the guidelines would provide the CFCB with direction on potential punishments, which it could take into account when deciding on penalties. The guidelines should also include a definition of recidivism and penalties for recidivist offenders. The guidelines would be most appropriately contained within the PR.

A further proposal from Sims is that the definition of a 'related party' should be extended because UEFA's definition is currently too narrow.<sup>1054</sup> He recommends that the definition should be similar to the definition used by the US Securities and Exchange Commission.<sup>1055</sup> He also suggests that the CFCB needs to utilise a stronger interpretation of UEFA's wording that two parties are related if they 'are controlled, jointly controlled, or significantly

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[manchester-city-champions-league-ban-appeal-verdict-banned-how-long-why-transfer-news/news-story/b7b9f02403d5a805f0512b5dcf19c7ba>](https://www.forbes.com/sites/bobbymcmahon/2020/02/16/uefa-ban-manchester-city-for-2-years-separating-the-facts-from-fiction/?sh=6229ed72204f). See also 'Bobby McMahon, UEFA bans Manchester City for 2 years: separating facts from fiction', *Forbes* (Web Page, 16 February 2020) <<https://www.forbes.com/sites/bobbymcmahon/2020/02/16/uefa-ban-manchester-city-for-2-years-separating-the-facts-from-fiction/?sh=6229ed72204f>>.

<sup>1050</sup> 'Media Release – The Court of Arbitration for Sport (CAS) upholds appeal filed by Paris St Germain', *TAS/CAS* (19 March 2019) <<https://www.tas-cas.org/en/media/media-releases/article/paris-saint-germain-uefa-the-cas-upholds-the-appeal-filed-by-paris-saint-germain.html>>. See also BBC Sport, 'Paris St-Germain: UEFA cannot reopen closed investigation, says CAS', *BBC* (Web Page, 19 March 2019) <<https://www.bbc.com/sport/football/47632779>>.

<sup>1051</sup> Patrick Sims, 'The Circumvention of UEFA's Financial Fair Play Rules through the influx of foreign investments' (2018) 39(1) *Northwestern Journal of International Law and Business* 59.

<sup>1052</sup> *Ibid* 78. Sims' suggestion appeared to have been taken on board, with Manchester City receiving a two year ban from UEFA's competitions for its recent breach of the breakeven requirement. This was a second offence. However, CAS found that there had been no breach and the two year ban was withdrawn.

<sup>1053</sup> *Ibid* 79.

<sup>1054</sup> *Ibid* 81.

<sup>1055</sup> *Ibid*.

influenced by the same government'.<sup>1056</sup> He points out how mystifying it was that the CFCB did not find that Etihad Airways was a 'related party' in its sponsorship of Manchester City.<sup>1057</sup> In the circumstances, Sims suggests that UEFA should consider strengthening its definition of 'significant influence' so that the CFCB has no option but to find that the relationship between the owner of Manchester City and Etihad Airways satisfies the definition of a 'related party'.<sup>1058</sup> In this, Sims appears correct and UEFA should invoke a stronger definition of 'significant influence', especially given the narrow interpretation of the definition of a 'related party' that the CFCB has adopted to date, as seen with its Etihad Airways determination.

The valuation of a sponsorship agreement should also be carried out by UEFA in the first place rather than allowing clubs to determine their own figures.<sup>1059</sup> This would remove any difference of opinion from the equation and would also make clubs more wary about entering into those transactions if they knew a valuation would be carried out by UEFA.<sup>1060</sup> Further, there would almost certainly be a delay in UEFA providing its valuation and this may inhibit clubs from pursuing related party sponsorships, since they are often seeking funds quickly.<sup>1061</sup> Sims supports this approach. Its main benefit is that UEFA could take control of the valuation process from the outset and thus be in a stronger position to deal with it.

UEFA should therefore review the troublesome area of valuations, particularly in relation to related party sponsorship agreements. This would provide clearer and tougher regulations so clubs would think more carefully before trying to secure over-valued agreements, which could give them a clear advantage over other clubs that are honouring their breakeven requirements. In addition, UEFA should improve its administrative support for the CFCB, which has lost two appeals cases in CAS due to exceeding time limits, to enable the CFCB to meet its own procedural rules.<sup>1062</sup> It is noteworthy that UEFA has since changed Article 16 in the latest edition of the PR to provide the adjudicatory chamber with a longer period of time to review decisions of the CFCB chief investigator.<sup>1063</sup>

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<sup>1056</sup> Ibid.

<sup>1057</sup> Ibid.

<sup>1058</sup> Ibid. Manchester City's owner is a member of the royal family of UAE and the owner of Etihad Airways is the UAE government.

<sup>1059</sup> Sims (n 1051) 82.

<sup>1060</sup> Ibid 83.

<sup>1061</sup> Ibid.

<sup>1062</sup> The cases involved Galatasary and PSG. Both appeals took place in CAS in 2019 and UEFA failed because the CFCB had not made its determination within the allotted time period.

<sup>1063</sup> *Procedural rules governing the UEFA Club Financial Control Body* (Edition 2019) art 16(1).

Another area that requires consideration in relation to good governance is the settlement agreement often used by the CFCB chief investigator to finalise an investigation into a club, with the aim of making that club comply with the FFP Regulations. Settlement agreements are used in cases ‘which justify the conclusion of an effective, equitable and dissuasive settlement without referring the case to the adjudicatory chamber’.<sup>1064</sup> They have been used in the majority of cases dealt with by the CFCB. However, a settlement agreement was not offered to AC Milan in its case. In the subsequent CAS hearing, *AC Milan v UEFA* (‘*AC Milan*’),<sup>1065</sup> the club’s legal representatives ‘argued that the regulatory framework for offering a settlement agreement was incompatible with EU competition law, since the basis on which settlement might be offered is unclear and not set out in the Regulations’.<sup>1066</sup> It was submitted that compliance with the ECL required that ‘the conditions to be eligible for a settlement agreement are clearly known and explained to the clubs’.<sup>1067</sup> In essence, AC Milan argued that it was entitled to a settlement agreement and had been treated inequitably.<sup>1068</sup> Its breakeven deficit was no greater than that of Manchester City and PSG and they had received settlement agreements in 2014.<sup>1069</sup> CAS rejected this argument, viewing the settlement agreements and sanctions as being similar. It took the view that settlement agreements contain some form of sanction and that ‘the CFCB was entitled to choose one method of dealing with breaches over another as it deemed appropriate’.<sup>1070</sup> However, Nolan suggests there is a material difference between a settlement agreement, which is agreed by the parties, and a sanction that is unilaterally imposed and if this view was to be accepted in the future the FFP Regulations could be considered in breach of ECL due to UEFA’s unequal application of its sanctions.<sup>1071</sup> This was found to be the position in the *International Skating Union* case<sup>1072</sup> where the European Commission found that there were no ‘pre-established, clear and transparent criteria as to how the sanctions are to be applied’.<sup>1073</sup>

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<sup>1064</sup> Ibid art 15(1).

<sup>1065</sup> CAS *AC Milan v UEFA* 2018/A/5808 (‘*AC Milan*’).

<sup>1066</sup> Tomas Nolan, ‘The Deficiency of Fairness in Financial Fair Play’ (15 May 2019) *LawInSport* 3 <<https://www.lawinsport.com/topics/features/item/the-deficiency-of-fairness-in-financial-fair-play>>.

<sup>1067</sup> Ibid.

<sup>1068</sup> *AC Milan* (n 1065) 77(j).

<sup>1069</sup> Ibid.

<sup>1070</sup> Nolan (n 1066) 3.

<sup>1071</sup> Ibid 4.

<sup>1072</sup> *Summary of Commission Decision (Case AT 40208 – International Skating Union’s Eligibility Rules)* [2018] OJ C 148, 9–12 (‘*International Skating Union*’), <[https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52018XC0427\(02\)](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52018XC0427(02))>.

<sup>1073</sup> Nolan (n 1066) 5.

In the circumstances, it would be a proactive and pre-emptive move on UEFA's part to remedy this situation. This would not be difficult, with Nolan stating that 'UEFA need only amend Article 15 of the procedural Rules to properly define the circumstances in which a club may be offered a Settlement Agreement and ensure that these guidelines are applied in a fair and independent manner.'<sup>1074</sup> Even if the issue does not need to be resolved to meet ECL requirements, from a good governance perspective having open and transparent rules available for clubs is appropriate.

The voluntary agreement, where clubs can apply for an agreement to breach the breakeven requirement for an agreed period of time, may benefit from a similar review to ensure its guidelines are clear and transparent. Basic information about eligibility and process are provided but criteria about how the assessment is conducted may also be appropriate. Material about voluntary agreements appears sparse, with the only information obtained relating to AC Milan's inability to secure one in 2017.<sup>1075</sup> Critical of UEFA's handling of the AC Milan matter, Taormina stated, 'AC Milan's financial and ownership instability reveals UEFA's lack of diligence of the financial risks that are inherent in the sale of European clubs to new buyers'.<sup>1076</sup> He puts forward two proposals to cover the situation of new clubs. First, he proposes that the FFP Regulations should be changed to allow clubs undergoing a change in ownership 'to incur a higher deficit if it is completely covered by a direct injection of capital from the owners'.<sup>1077</sup> Second, he proposes that the FFP Regulations incorporate 'a preliminary judgment process' whereby potential new buyers are screened.<sup>1078</sup> These proposals should not be necessary and a transparent and equitably operated voluntary agreement system and the breakeven requirement provision should cover the situation satisfactorily. It might be appropriate for UEFA to offer advice to potential new owners if they request it but, as Taormina admits, 'UEFA likely has no legal authority to *prevent* such a transaction.'<sup>1079</sup> The AC Milan example could be seen as a warning about the potential

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<sup>1074</sup> Ibid.

<sup>1075</sup> Bobby McMahon, 'UEFA not convinced by Milan financial fair play pitch; rejects option of a voluntary settlement', *Forbes* (Web Page, 15 December 2017) <<https://www.forbes.com/sites/bobbymcmahon/2017/12/15/uefa-not-convinced-by-milans-financial-fair-play-pitch-rejects-option-of-a-voluntary-settlement>>. See also UEFA, 'AC Milan request for voluntary agreement rejected', *UEFA.com* (Web Page, 15 December 2017) <<https://www.uefa.com/insideuefa/protecting-the-game/news/0240-0f8e5a561875-f0233516e57b-1000-ac-milan-request-for-voluntary-agreement-rejected/>>.

<sup>1076</sup> Taormina (n 771) 1322.

<sup>1077</sup> Ibid 1323.

<sup>1078</sup> Ibid.

<sup>1079</sup> Ibid. Approval for the purchase was presumably obtained from Serie A as this was the body directly affected by the change in ownership of the AC Milan club.



difficulties that could arise in respect of the voluntary agreement and it would be advisable for UEFA, from a good governance perspective, to take the necessary action to prevent this possibility from arising by providing criteria as to how the assessment is conducted.

One further area which needs to be considered, from a transparency perspective, is that of sanctions. In many respects this is an extension of the previously discussed issue of settlement agreements as they can be seen as falling within the field of sanctions. The sanction issue arose in *AC Milan*<sup>1080</sup> where the imposition of a one year ban from UEFA competitions was held to be not proportionate. The CAS panel held that ‘some important elements regarding the financial situation of the Club and the recent change in the Club’s ownership have not been properly assessed at the moment when the contested decision was rendered’.<sup>1081</sup> It referred the matter back to the CFCB to determine a new proportionate disciplinary measure. Although the panel did not directly criticise UEFA’s sanctioning system *per se*, restricting its comments to the facts of the *AC Milan* case, it is apparent, as Bastianon says, that ‘UEFA does not apply clear and transparent criteria as to how its sanctions are to be applied.’<sup>1082</sup> Thus, using the same reasoning as was applied to settlement agreements, it would be advisable for UEFA to provide a clear and transparent guide to the penalties which clubs can expect to receive for breaches of the FFP Regulations.

Transparency and openness is a two-way street. It is incumbent on a regulator to provide the necessary information to the regulated to ensure they clearly know what is expected. Similarly, however, the regulated need to be transparent and cooperative in their responses to the regulator. This was not the case in the CAS proceedings between UEFA and Manchester City where the panel held that Manchester City had breached Article 56 of the FFP Regulations by failing to cooperate with the CFCB’s investigations.<sup>1083</sup> The panel indicated that the club had not only failed to cooperate but had also obstructed UEFA’s

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<sup>1080</sup> *AC Milan* (n 1065).

<sup>1081</sup> Stefano Bastianon, ‘The proportionality test under Art. 101(1) TFEU and the legitimacy of UEFA financial fair-play regulations: From the Meca Medina and Majcen ruling of the European Court of Justice to the Galatasary and AC Milan awards of the Court of Arbitration for Sport’, *Asser International Sports Law Blog* (Blog Post, 14 October 2018) 6 <<https://www.asser.nl/SportsLaw/Blog/post/the-proportionality-test-under-art-101-1-tfeu-and-the-legitimacy-of-uefa-financial-fair-play-regulations>>.

<sup>1082</sup> *Ibid* 8.

<sup>1083</sup> Court of Arbitration for Sport, *Media Release, Football – UEFA competitions – Manchester City did not disguise equity funding as sponsorship contributions but did fail to cooperate with the UEFA authorities* (13 July 2020) <<https://www.sportsintegrityinitiative.com/manchester-city-fc-did-not-disguise-equity-funding-as-sponsorship-contributions-but-did-fail-to-cooperate-with-the-uefa-authorities/>>. See also *Manchester City FC v UEFA* CAS 2020/A/6785.

investigations.<sup>1084</sup> As a result of this decision, UEFA should consider whether it needs to tighten its regulations to prevent a similar occurrence taking place in the future. If regulations are going to be applied they need to be applied consistently and effectively because if not, the regulated will lose respect for not only the regulations but also the regulating body.

One area of concern is the limitation period in which the CFCB must instigate any proceedings. Currently, the period for prosecution is set at five years and CAS interpreted this in the Manchester City case to be five years from when the breach took place. This can create enforcement issues for the CFCB if it does not become immediately aware of the breach. Therefore, UEFA needs to consider rewording its limitation period so that time begins to run from when the CFCB ‘knew or ought to have reasonably known of the breach’. This would potentially give the CFCB more time to implement proceedings and would cover the situation where a club may seek to hide a breach. This type of wording is not uncommon in its use. It is used in cases of civil fraud, for instance, where the period of limitation does ‘not begin to run until the plaintiff has discovered the fraud...or could with reasonable diligence have discovered it’.<sup>1085</sup> Some regulatory bodies have a similar wording in their regulations. For instance, regulators of the financial services industry in the UK have three years from when they knew of the misconduct to commence proceedings.<sup>1086</sup> UEFA should amend their regulations to increase the limitation period in those cases where the CFCB is not immediately aware of a club’s transgression.

Furthermore, UEFA should consider strengthening the wording of Article 56 of the FFP Regulations. Although Manchester City was found to have breached this regulation, there is no requirement for clubs to disclose material. It would be advisable for UEFA to enhance this regulation to include powers for the CFCB to obtain ‘relevant documents from clubs, their owners and their sponsors’, to conduct interviews and to audit accounts regularly.<sup>1087</sup> These additional powers would provide the CFCB with the ability to fully investigate a club’s activities, where appropriate. However, UEFA would also have to ensure it had sufficient personnel to carry out investigations swiftly and efficiently. The added benefit of this stronger

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<sup>1084</sup> Ibid.

<sup>1085</sup> *Limitation Act 1980* (UK) s 32(1).

<sup>1086</sup> *Financial Services and Markets Act 2000* (UK) s 66(4).

<sup>1087</sup> Joseph Richmond, Jason Shardlow-Wrest and Ellie Millar, ‘The future of UEFA’s FFP Regulations – has the final whistle blown?’, *Linklaters* (Blog Post, 20 November 2020) <<https://www.linklaters.com/en/insights/blogs/sportinglinks/2020/november/the-future-of-uefas-ffp-regulations---has-the-final-whistle-blown>>.

approach would be that clubs would appreciate the need to comply with the regulations as there would be a greater chance of a breach being discovered.

## *7.5 Conclusion*

Overall the FFP Regulations appear to have achieved their aim of bringing financial stability to European football. Net debt has generally reduced among the clubs and they, as a group, are now producing operating profits rather than the losses which were occurring prior to the FFP Regulations being introduced. More specifically, overdue payables have been significantly reduced, which has provided greater protection for creditors, and clubs are operating within their means due to the breakeven provision.

It therefore seems that the FFP Regulations have assisted UEFA in meeting its general objectives and values. They have helped UEFA to provide viable competitions producing healthy revenue and allowing some of that income to support the lower levels of European football. Further, although causing major change to how football is run in Europe, the FFP Regulations have been accepted by the clubs and the majority of other stakeholders. Thus, UEFA has managed to retain unity within European football, another of UEFA's key objectives, and one of its important values.

The FFP Regulations also appear to meet acceptable governance standards in that they are reasonably clear, have not produced major interpretation difficulties and their enforcement seems to have been conducted by the independent CFCB with reasonableness and consistency. Notwithstanding this, there are a number of areas where improvements could be made to ensure more clarity. They include the definition of 'related party' which needs to be tightened, and the rules relating to sponsorship agreements where changes in procedure would be advisable. Other areas, such as the voluntary agreement, the settlement agreement and sanctions, would benefit from greater clarity as to their use and application and this could be achieved by clear guidelines on the process and procedures to be adopted. UEFA should also consider reviewing its limitation period and its requirement for disclosure from clubs to assist in monitoring and enforcing its FFP Regulations. The list of suggested changes appears large but, in reality, the work required is not substantial. It is important for any organisation to review its processes and procedures on a regular basis in the light of what has happened, and this is what UEFA needs to do in respect of its application of the FFP Regulations.

## CHAPTER 8: THE FINANCIAL FAIR PLAY (FFP) REGULATIONS AND THE REQUIREMENTS OF ARTICLES 45, 101 AND 102 OF THE TFEU

### 8.1 Introduction

In Chapter 6, the operation of Articles 45, 101 and 102 of the *TFEU* was discussed. This chapter will take that discussion further and will answer the second thesis question: Do the FFP Regulations meet the requirements of Articles 45, 101(1), and Article 102 of the *TFEU*? This will be done by reference exclusively to Articles 45, 101 and 102. There are other legal and quasi-legal areas, including European Treaty law and the support of the European Commission that could also be considered as influencing the validity of the FFP Regulations. However, their impact appears negligible and consequently they will be briefly considered initially before examining the relevant Articles in the *TFEU*.

### 8.2 European Treaty Law and the Position of the European Commission

Sport was considered in the Treaty of Amsterdam<sup>1088</sup> and the Treaty of Lisbon.<sup>1089</sup> In the Treaty of Amsterdam, the social significance of sport was acknowledged and bodies of the European Union were asked to listen to the views of sporting associations on the basis that sport was different to other businesses and needed to be given special consideration. As already discussed in Chapter 6.2, Article 165 of the Treaty of Lisbon states that the European Union will contribute to the promotion of sporting issues and take into account its specific nature. The wording of the Treaties is general and does not provide complete clarity from a sports' perspective, although the Lisbon Treaty did acknowledge the specificity of sport for the first time. Other documents have also been considered by the European Council in its regular review of sport, including the Helsinki report<sup>1090</sup> and the White Paper on Sport.<sup>1091</sup> The material considered and dealt with in these reports is clearly 'soft' law.<sup>1092</sup>

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<sup>1088</sup> European Parliament, *Treaty of Amsterdam* (1997) <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-amsterdam>

<sup>1089</sup> Eur-lex, *Treaty of Lisbon* (007) Doc 12007L/TXT <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT>

<sup>1090</sup> Eur-lex, *Helsinki Report on Sport* (1999) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF>

<sup>1091</sup> Eur-lex, *White Paper on Sport* (2007) Doc 52007DC0391 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52007DC0391>

<sup>1092</sup> 'Soft' law is law that is not legally binding and is, therefore, not enforceable. Agreements, principles and declarations can fall into this category. 'Soft' law needs to be contrasted with 'hard' law, which is legally binding and enforceable in a court of law.

The European Commission is the body dealing with the day-to-day issues arising in the European Union and has an important role to play administratively within it. UEFA appreciated the need to have a cooperative working relationship with the European Commission and worked to achieve it, following a cooling in the relationship after the *Bosman* decision.<sup>1093</sup> The European Commission has been supportive of the FFP Regulations, which has assisted UEFA in gaining credibility and stakeholder support for them but, as was discovered in the *Bosman* case<sup>1094</sup> the ECJ does not have to follow the views of the European Commission. Accordingly, no legal significance will be placed on the European Commission's support for the FFP Regulations in this thesis.

### 8.3 Article 45 of the TFEU

As discussed in Chapter 6.9, Article 45 was introduced to provide individuals from member countries of the European Union with the opportunity of working in other member countries. Article 45 reflects the concept of member countries joining together as a single entity and provides individuals from member countries with the freedom to work anywhere within that entity. At first sight the FFP Regulations might appear to breach Article 45 as they introduce a restriction on clubs' spending that may prevent a player from joining a particular club. However, the breakeven provision simply requires clubs to spend no more than they earn. The clubs choose how they meet that requirement. Clubs can choose the players they contract and there is nothing to prevent a club from employing a player who takes them over the breakeven requirement and then reducing its other commitments so that it falls within the threshold. Moreover, the breakeven requirement is applied over a three-year period, allowing a club to exceed the provision in one year providing it breaks even over the three year period.<sup>1095</sup>

As discussed in Chapter 5.4, there is also the deviation allowance of €5 million to take into account together with the larger deviation figure of €30 million that can apply where the excess expenditure is covered by contributions from equity participants or related parties.<sup>1096</sup>

Other ways to solve the issue include a club seeking a voluntary agreement<sup>1097</sup> with UEFA or agreeing to a reduced first year wage with the incoming player so that the club remains within the breakeven requirement for that accounting period. The club can then pay a higher wage

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<sup>1093</sup> *Bosman* (n 81).

<sup>1094</sup> *Ibid.*

<sup>1095</sup> See Chapter 5.4 for more information on the breakeven provision.

<sup>1096</sup> *UEFA Club Licensing and Financial Fair Play Regulations* (2018) art 61(2).

<sup>1097</sup> See Chapter 5.4 for more information on the voluntary agreement.

to the player in subsequent accounting periods when it can afford to do so and still meet the breakeven requirement. Although the breakeven provisions provide restrictions there appear to be a number of legitimate ways to circumvent them.

Similarly, the overdue payables rule,<sup>1098</sup> which has cut the time period for payment of debts, does not prevent a club from borrowing to pay a debt and nor does it prevent the club from agreeing when payment will be made. In practical terms, therefore, the FFP Regulations are unlikely to impact on Article 45.

From a legal perspective, the ECJ has granted exemptions to Article 45 in sports' cases where the issue is seen as being of a purely sporting nature. Since *Gebhard*,<sup>1099</sup> the ECJ has used the four conditions applied in that case: non-discrimination, suitability, necessity and proportionality. Those conditions are basically the same as those subsequently used in the *Wouters*<sup>1100</sup> case in relation to Articles 101 and 102 of the *TFEU*. In the early case of *Walrave and Koch*,<sup>1101</sup> the ECJ sanctioned the right of a sporting body to determine that the pacemakers in a national cycling team should come from the same country as the stayer cyclists. The ECJ stated that Article 45 does not prevent the adoption of rules excluding foreign sports' players from certain matches which are of sporting interest only, as would be the case of matches between national teams from different countries. In the *Dona*<sup>1102</sup> case, the situation was different with the Italian Football Federation only allowing players affiliated with their Association to play in the Italian league. Since only persons of Italian nationality could be affiliated, the Italian Football Association was, in effect, excluding foreign players from playing in the Italian league. This breached Article 45.

The *Bosman*<sup>1103</sup> ruling can also be viewed as consistent with the earlier case law. The football transfer system, at the time, did not allow a player to move to a new club, even if his contract was ended, unless the player's old club consented. The ECJ held this to be in breach of Article 45 (Article 48 as it was then) with the contract arrangements causing a clear impediment to the free movement of European workers. Similarly, despite UEFA's 'gentlemen's agreement' with the European Commission, the ECJ held the 'three plus two' rule, classifying European nationals as 'foreign' and restricting the number of foreign players in a club side, also

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<sup>1098</sup> The overdues payable rule is discussed in Chapter 5.4.

<sup>1099</sup> *Gebhard* (n 940).

<sup>1100</sup> *Wouters* (n 849).

<sup>1101</sup> *Walrave and Koch* (n 732).

<sup>1102</sup> *Dona* (n 735).

<sup>1103</sup> *Bosman* (n 81).

breached Article 45. An understandable distinction was made here with the *Walrave and Koch* case<sup>1104</sup> which involved players representing a national, as opposed to a club, team.

The conditions used in *Gebhard*<sup>1105</sup> were also applied in the subsequent cases of *Deliège*,<sup>1106</sup> *Lehtonen*<sup>1107</sup> and *Bernard*.<sup>1108</sup> They involved, respectively, national participants in international competitions, transfer windows, and training compensation claims for young players. In each case the ECJ, using the *Gebhard* conditions,<sup>1109</sup> found that a valid exception to Article 45 had arisen. The ECJ is likely to use the *Gebhard* conditions<sup>1110</sup> to determine the validity of the FFP Regulations in relation to Article 45 and each condition used in the *Gebhard* case will now be examined to ascertain how the ECJ might decide. As discussed in Chapter 6, commentators have expressed differing views about how the Court would decide the matter. In particular, Lindholm<sup>1111</sup> believes that the FFP Regulations would not pass the proportionality test, while Stroucken<sup>1112</sup> generally supports the view that the Court would find that the FFP Regulations do not breach Article 45.

The first condition used in the *Gebhard* case is that the body imposing the regulation must do so in a non-discriminatory manner. UEFA appears to do this by imposing similar rules on all European football clubs. There are no exceptions, with the breakeven provision and the overdue payables rule being imposed uniformly.

Legitimacy is the second condition. The purpose of the FFP Regulations seem legitimate, that is, to ensure the financial stability and well-being of European football. UEFA should be able to convince the Court that the measures are required, bearing in mind the sporting context, with clubs relying heavily on having each other to compete against and the problems that can arise should a club be forced to leave a competition because of financial issues.<sup>1113</sup> Further, UEFA would be in a position to substantiate to the Court the financial problems that existed within European football at the time it introduced its FFP Regulations by revealing details of

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<sup>1104</sup> *Walrave and Koch* (n 732).

<sup>1105</sup> *Gebhard* (n 940).

<sup>1106</sup> *Deliège* (n 957).

<sup>1107</sup> *Lehtonen* (n 959).

<sup>1108</sup> Case C-325/08, *Olympique Lyonnais SASP v Oliver Bernard and Newcastle UFC* [2010] ECR I-02177.

<sup>1109</sup> *Gebhard* (n 940).

<sup>1110</sup> *Ibid.*

<sup>1111</sup> Lindholm (n 167) 207.

<sup>1112</sup> Stroucken (n 967) 27.

<sup>1113</sup> See also Chapters 2.2, 6.5, and 9.3 on the interdependence of clubs in professional team sports.

the high debt levels among clubs and by referring to high profile examples of clubs like Portsmouth and Rangers who went into administration and liquidation, respectively.<sup>1114</sup>

The third condition is suitability and once again UEFA should be able to show that the breakeven provision and the payment of overdue payables within a reasonable time period will enhance financial stability amongst European football clubs. The restrictions imposed appear to be inherent in achieving UEFA's aim of financial stability within European football.

Proportionality is the fourth condition and the FFP Regulations seem to meet this requirement for several reasons. It does not seem disproportionate to expect a football club to operate within its means, which the breakeven and overdue payables regulations require. The clubs have latitude to determine how they break even, with it normally being feasible for them to make savings in one area in order to spend more in another. Thus, each club can make its own decisions in this respect. The recent relaxation of the FFP Regulations, with the clubs being able to reach an agreement with UEFA, allowing them to breach the breakeven principle in the short term provided they return to the breakeven position after an agreed period of time, promotes a flexible approach which the Court is likely to accept as proportional. The other means of financial restraint such as a salary cap, revenue sharing or a luxury tax, have the potential to impose even greater restrictions on the movement of players and will not provide as sound a method to ensure financial stability as the breakeven provision. The FFP Regulations do not seem to deviate from sound business principles that would apply to any business requiring it to spend no more than it earns and pay its debts in a timely manner. For these reasons it is likely that the ECJ will determine the FFP Regulations are not in breach of Article 45.

#### *8.4 Article 101 of the TFEU*

Article 101 seeks to prevent entities from conduct that will affect or disrupt competition within the European Union's internal market. Several commentators have suggested that the FFP Regulations breach this Article.<sup>1115</sup> As discussed in Chapter 6, three elements need to be established for Article 101 to apply.<sup>1116</sup> The initial two elements are relatively easy to prove.

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<sup>1114</sup> See Chapter 5.4 for more information. Rangers went into administration before they went into liquidation. See Dunbar (n 574) 2. Portsmouth actually went into administration on two occasions. The first was in 2010 and the second was in 2012. See Dunbar (n 574) 2.

<sup>1115</sup> See, eg, Lindholm (n 167) 208-211. See also Kaplan (n 763) 857. See also Weatherill (n 812) 274 and Jemson (n 766) 19.

<sup>1116</sup> See Chapter 6.3.



First, there needs to be an agreement between undertakings or a decision by an association of undertakings. UEFA would almost certainly be considered by the ECJ to be an association of undertakings as FIFA was in *Piau*.<sup>1117</sup> It is plainly apparent that there has been an agreement between UEFA and its national association members to approve the FFP Regulations. Secondly, the agreement must affect trade. ‘Trade’ is given a very wide definition and the FFP Regulations simply have to influence the pattern of trade between member states.<sup>1118</sup> The FFP Regulations (including the breakeven and no overdue payables requirements) have an influence on trade because clubs may potentially have less money available to purchase new players.

The third element is more problematic as it requires that the agreement must have the object or effect of restricting competition. The legislation provides that the terms ‘object’ and ‘effect’ are to be treated as alternatives so each needs to be considered independently.<sup>1119</sup> The terms ‘object’ and ‘effect’ seem to have been specifically incorporated in the legislation to differentiate between a conduct and an outcome assessment.<sup>1120</sup> The ‘object’ assessment requires a contextual path to be taken whereby the ECJ will look at the agreement, its objectives, and consider the background to the arrangement to ascertain the purpose of the agreement to decide whether it restricts competition. However, the ‘effect’ assessment goes beyond the documentation to analyse the actual effect of the agreement. If a distinction along these lines was not intended, then there would have been no need to use both terms in the legislation.

Whether an agreement has an anti-competitive objective, is determined by ‘the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part’.<sup>1121</sup> If that is the test then it is likely that the ECJ would find that the FFP Regulations were established by a group of European football associations to secure financial stability for their clubs and that is achieved by requiring those clubs to pay their debts within

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<sup>1117</sup> *Piau* (n 765) at [71]-[72].

<sup>1118</sup> *Societe Technique Miniere* (n 772). See also *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C 101/81 at [19] (‘*Guidelines on the effect on trade concept*’). <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427\(06\)&from=HR](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(06)&from=HR)>.

<sup>1119</sup> *Guidelines on the effect on trade concept* (n 1118) at [19] and [20].

<sup>1120</sup> Bernadette Zelger, “‘By object’ restrictions pursuant to Article 101(1) TFEU: a clear matter or a mess, and a critical analysis of the court’s judgement in *Expedia*?” (2017) 13(2–3) *European Competition Journal* 356, 359.

<sup>1121</sup> *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* [2011] OJ C 11 at [25] <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF>>. See, eg, Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* EU: C; 2009:343 at [27].

a reasonable time and to not spend more than they earn from their football revenue. There is no direct attempt to influence the market in any way and there does not appear, prima facie, to be any intention on the part of the parties to interfere with the conduct of the market, although ‘the parties’ intention is not a necessary factor in determining whether an agreement has an anti-competitive object’.<sup>1122</sup> The ECJ does not have to look at ‘the concrete effects of the agreement’,<sup>1123</sup> but, notwithstanding this, it would need to determine the type of agreement it is reviewing.

The agreement will normally be either a horizontal or vertical one with the ECJ considering different aspects depending on which type it is.<sup>1124</sup> The UEFA agreement could be seen as having elements of both. There is a vertical element with UEFA being seen to impose licensing and financial obligations on the football clubs, and also a horizontal element in that UEFA, the clubs and the national associations are working together to administer the sport of football. In the case of non-competitors (vertical agreements), the ECJ will consider limitations put on the seller or buyer of goods (including the ability to determine its resale price) as a restriction by object.<sup>1125</sup> In the case of agreements between competitors (horizontal agreements), the Court will view issues like price fixing, market sharing, output restrictions and bid-rigging as being examples of restriction by object.<sup>1126</sup> The difficulty is that the UEFA example is very different to the other cases that have been before the European Court. Previous cases, including *Miller v Commission*<sup>1127</sup> and *Consten SaRL and Grundig GmbH v Commission*<sup>1128</sup> have been of a more commercial nature and the Court, in applying the restriction by object, have had much clearer cases of restricting competition to consider.

Kaplan suggests that there is an element of self-incrimination in that UEFA has made admissions which confirm that its intentions show the anti-competitive nature of the FFP

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<sup>1122</sup> Ibid.

<sup>1123</sup> European Commission (n 1119) at [20].

<sup>1124</sup> The term vertical agreement denotes agreements between businesses at different levels in the supply chain. A horizontal agreement denotes agreements between competing businesses operating at the same level in the market.

<sup>1125</sup> European Commission (n 1119) at [25]. See also Bernadette Zelger, “‘By object’ restrictions pursuant to Article 101(1) TFEU: a clear matter or a mess, and a critical analysis of the court’s judgement in Expedia?” (2017) 13(2–3) *European Competition Journal* 356, 364.

<sup>1126</sup> Ibid.

<sup>1127</sup> Case 19/77 *Miller v Commission* (1978) ECR 131. This case involved prohibiting exports, which was held to be a restriction on competition.

<sup>1128</sup> Cases 56/64 and 58/64 *Consten SaRL and Grundig GmbH v Commission* (1966) ECR 299. This case involved appointing an exclusive distributor of electronic goods in France, which was held to be unlawful, as it was important to ensure that there were parallel imports from one state to another.

Regulations.<sup>1129</sup> However, the actual objectives contained within the FFP Regulations themselves do not suggest an anti-competitive nature, a key intention being ‘to improve the economic and financial capability of the clubs, increasing their transparency and credibility’.<sup>1130</sup> Nevertheless, as discussed in Chapter 6.3, UEFA has occasionally made comments which could be construed as suggesting that the FFP Regulations seek to restrict competition. In its Benchmarking Report 2011, UEFA referred to ‘the control of wages...remains football’s greatest challenge’<sup>1131</sup> and in its website page on the FFP Regulations it has referred to one of the objectives as being to ‘decrease pressure on salaries and transfers and limit inflationary effect’.<sup>1132</sup> This particular objective was removed from its website page when the page was last updated. However, these comments do not necessarily suggest that UEFA intended to restrict competition. They have only ever appeared in individual pieces of literature produced by UEFA and have never been adopted as part of the official objectives contained in the various editions of the CLFFPR.<sup>1133</sup>

The argument that the FFP Regulations restore the differences between national markets and that this breaches Article 101(1) ‘by object’ also appears questionable.<sup>1134</sup> To establish her point, Kaplan links the FFP Regulations to the part payment of broadcasting revenue made to clubs according to the population of the member country.<sup>1135</sup> However, it is the payment of broadcasting revenue, according to the population of the member country which restores the divisions, rather than the FFP Regulations. In these circumstances, it is unlikely that a Court would hold the FFP Regulations to breach Article 101(1) by object on this ground.

A further argument that the FFP Regulations are in breach of Article 101(1) is that they are a type of price fixing.<sup>1136</sup> There seems to be little merit in this suggestion with the main element of the FFP Regulations being the breakeven requirement, which actually provides some flexibility to the clubs. In fairness, Jemson who promotes this suggestion does concede that the breakeven requirement is more flexible than a salary cap and that this could lead the ECJ

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<sup>1129</sup> Valerie Kaplan (n 763) 819.

<sup>1130</sup> *UEFA Club Licensing and Financial Fair Play Regulations Edition 2018* art 2(2).

<sup>1131</sup> UEFA, ‘The European Club Licensing Benchmarking Report Financial Year 2011’, *UEFA.com* (Web Page)

<[https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/91/61/84/1916184\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/91/61/84/1916184_DOWNLOAD.pdf)>.

<sup>1132</sup> UEFA (n 589) 2.

<sup>1133</sup> Four official editions of UEFA Club Licensing and Financial Fair Play Regulations have produced, in 2010, 2012, 2015 and 2018.

<sup>1134</sup> Kaplan (n 763) 819-823.

<sup>1135</sup> *Ibid* 821–823. See also Chapter 6.3.

<sup>1136</sup> Jensen (n 766) 19.

to determine that no price-fixing exists.<sup>1137</sup> It seems most unlikely that the ECJ would view the FFP Regulations as price-fixing. The clubs have an unqualified choice about how they spend their income. The only restriction is the breakeven requirement and even this has some latitude with deviation allowances and the potential for voluntary agreements.

In summary, it is possible that the ECJ would hold that the FFP Regulations do not have an anti-competitive objective. This is based on the view that the ECJ would look broadly at the FFP Regulations and how they potentially restrict competition. It does, however, depend on the ECJ looking at the situation in this way because if it were to take a more analytical approach the outcome might be different. For instance, the ECJ could consider an agreement to restrict the volume of supply or production capacity as a restriction of output and thus a restriction by object. It is unlikely that the ECJ would come to this conclusion looking at the FFP Regulations broadly. However, if the ECJ undertook a more thorough analysis it may conclude that the FFP Regulations have the potential to reduce disposable income, thus restricting the volume of supply capacity which could, therefore, restrict competition.

Two further points make predicting the ECJ's view difficult. First, the lack of any requirement for intention by the parties makes it harder to anticipate the ECJ's view on this topic.<sup>1138</sup> If intention were required it would be possible to look at the actions of the parties to ascertain whether their objective was to restrict competition. On the other hand, with no intention needed the behaviour of the parties becomes immaterial and it could be more difficult to determine whether the objective was to restrict competition. In UEFA's case it is difficult to see its behaviour as intentionally restricting competition. Nevertheless, in a situation where intention is not required, it would seem harder to reach a determination. Secondly, as already indicated, an example like the FFP Regulations has not been considered by the ECJ before, so there is no obvious precedent.

Even if UEFA was able to establish that its FFP Regulations were not restricting competition by object it would still need to show that they were not anti-competitive by effect. The two step process used to determine the 'effect' of restricting competition requires the market to be defined and then an analysis to be undertaken of how the FFP Regulations will affect the different areas of that market.<sup>1139</sup> The key word is 'analysis', because unlike 'object', there is

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<sup>1137</sup> Ibid.

<sup>1138</sup> European Commission (n 1119) at [25].

<sup>1139</sup> Kaplan (n 763) 824. See also *Stergios Delimitis v Henniger BrauAG* (1991) ECR I-935 at [20], [22] and [24].

a definite need to look at the ‘effects’ of the agreement. Prima facie, this would seem to be a higher hurdle for UEFA to clear than the objective test considered above. Some commentators have concluded that the FFP Regulations do have the effect of restricting competition. Kaplan, for instance, maintains that the breakeven principle restricts competition on a number of grounds including restricting transfer prices, creating an oligopolistic market, lowering players’ wages and reducing the ability of clubs to compete.<sup>1140</sup> Her argument is that clubs are restricted in their transfer price bids due to the FFP Regulations. She supports this with two examples: Jose Mourinho, then manager of Chelsea, reporting that he could not sign Falcao and Cavani in the 2013 summer transfer window due to the FFP Regulations<sup>1141</sup> and PSG not being able to sign Angel Di Maria in the 2014 summer transfer window ‘because the requested transfer price was too expensive under FFP’.<sup>1142</sup> These examples are interesting but how much effect the FFP Regulations had on those transfers is open to conjecture. Falcao moved to Monaco for a club record fee of €60 million,<sup>1143</sup> Cavani moved to PSG for €64 million<sup>1144</sup> and Angel Di Maria moved to Manchester United for a then British record fee of €67 million.<sup>1145</sup> The actual transfer fees paid and the fact the players found other clubs without too much difficulty suggests that the FFP Regulations may not have such a major effect on the transfer market as one might expect. This is further evidenced by the transfer of Brazilian player, Neymar, to PSG in 2017 for the world record transfer fee of €222 million.<sup>1146</sup>

Further evidence of the effect of the FFP Regulations on transfer fees can be provided by considering a more general view of the transfer market rather than concentrating on the top transfer fees. An analysis of the number and value of transfers occurring in three of the top European leagues namely the EPL, La Liga and Serie A in 2010–11 (a season prior to the

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<sup>1140</sup> Ibid 823–834.

<sup>1141</sup> Ibid 829.

<sup>1142</sup> Ibid 833.

<sup>1143</sup> Ian Holyman, ‘Monaco sign Falcao from Atletico’, *ESPN* (Web Page, 1 June 2013) <[https://www.espn.com.au/football/news/story/\\_/id/1465178/monaco-sign-falcao-atletico](https://www.espn.com.au/football/news/story/_/id/1465178/monaco-sign-falcao-atletico)>.

<sup>1144</sup> ‘Edinson Cavani joins Paris-Saint-Germain foe French club record fee’, *The Guardian* (online at 17 July 2013) <<https://www.theguardian.com/football/2013/jul/16/edinson-cavani-paris-saint-germain-transfer>>.

<sup>1145</sup> Mark Ogden, ‘Angel Di Maria signs for Manchester United in £59.7 million deal’, *The Telegraph* (online at 26 August 2014) <<https://www.telegraph.co.uk/sport/football/teams/manchester-united/11056019/angel-di-maria-signs-for-manchester-united-in-59.7-million-deal.html>>.

<sup>1146</sup> Julien Laurens, ‘Neymar: how the record-breaking €222m move to PSG unfolded’, *The Guardian* (online at 5 August 2017) <<https://www.theguardian.com/football/2017/aug/04/neymar-how-record-breaking-move-to-psg-unfolded>>.

introduction of the FFP Regulations) and 2017–18 (a season post the introduction of the FFP Regulations) is revealed in Table 1 below.<sup>1147</sup>

**Table 1**

<b>League/season</b>	<b>Number of transfers</b>	<b>Value of transfers</b>
<b>EPL</b>		
2010/11 season	148	€510m
2017/18 season	160	€1909m
<b>LA LIGA</b>		
2010/11 season	104	€226m
2017/18 season	197	€729m
<b>SERIE A</b>		
2010/11 season	129	€169m
2017/18 season	238	€707m

The results show not only an increase in the total value of the transfers but also that the physical number of transfers increased in these leagues. It could be argued that the leagues are not a good cross-section of European leagues because they are tilted towards the top leagues in Europe. However, the fact remains that the FFP Regulations only apply to the better clubs which compete in UEFA’s competitions, so focusing on the top leagues which provide the majority of the clubs for UEFA’s competition is not unreasonable. In summary, the evidence does not seem to support a view that transfer fees have decreased since the introduction of the FFP Regulations. In fact, the opposite appears to be the case.

Kaplan maintains that the FFP Regulations, together with UEFA’s release of information about the individual clubs’ financial positions, allows an oligopolistic market to occur because

<sup>1147</sup> ‘Soccer Transfer Center’, *Soccer News* (Web Page, visited 26 July 2020) <<https://www.soccernews.com/soccer-transfers/>>.

clubs can work out what other clubs can afford to pay for players. This can be questioned on two fronts. First, UEFA has strict confidentiality rules in respect of information provided by clubs to establish their breakeven position and the information that is provided in its benchmarking reports is generally classified by countries not clubs. Secondly, it can be argued that the breakeven position merely maintains the financial differential between clubs on the basis that some clubs will always have more money to spend than others, irrespective of the FFP Regulations. There would be a huge financial differential between some clubs whether the FFP Regulations were applicable or not. While it is acknowledged that the original FFP Regulations did not allow for individual owner/patron investment into a club, this changed in 2015 when UEFA relaxed its position, allowing an individual club to seek a voluntary agreement with UEFA. These agreements do require a guarantee from the equity participant to cover the breakeven shortfall over the period of the agreement, but they do have the potential to allow new investment into the game. Therefore, they possibly provide the means for a club to be transformed into a major football force like Manchester City, PSG or Chelsea, which means the risk of an oligopoly is not as great now as it was when Kaplan's article was published.

A further criticism of the FFP Regulations is that they affect players' wages and the clubs' ability to compete with each other.<sup>1148</sup> It has been suggested that the breakeven requirement means there is less money available to pay player wages and to allow poorer clubs to compete against the wealthier ones.<sup>1149</sup> The question is whether this actually occurs in practice. It could be argued that the breakeven requirement reduces wages and transfer fees and therefore makes it more likely the smaller clubs could afford some of the better players. Although, since the smaller clubs also have to break even, they may not have as much money available to pay even lower transfer fees and wages. The more likely situation, however, is that the wealthy clubs are not overly affected by the breakeven requirement as they make considerable net profits and have plenty of funds available to meet large transfer fees and high wages. Further, there are sufficient wealthy clubs in existence to provide a competitive market, which explains why transfer fees and wages have remained high for elite players even since the introduction of the FFP Regulations.

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<sup>1148</sup> Kaplan (n 763) 832–834.

<sup>1149</sup> Ibid.

It has also been argued that the FFP Regulations reduce the ability of poorer clubs to compete with the richer ones.<sup>1150</sup> Taormina appears to support this view, seeing the FFP Regulations as creating a barrier for new clubs and investors.<sup>1151</sup> However, it can be argued that the FFP Regulations have not really changed the ability of the clubs to compete. The poorer clubs were not able to compete with the wealthy clubs before the introduction of the FFP Regulations and, in essence, the FFP Regulations have not changed that situation. The clubs have simply been subjected to a common requirement that they should not spend more than they earn. The FFP Regulations may not exacerbate the imbalance but simply allow it to continue.

Another criticism of the FFP Regulations is that as a ‘soft’ salary cap they are likely to reduce overall salary costs, which in turn would create an anti-competitive effect.<sup>1152</sup> Once again, this argument is based mainly on theory with reference to the work of Dietl on ‘soft’ salary caps.<sup>1153</sup> Dietl’s work was published in 2008, prior to the introduction of the FFP Regulations, so his views on ‘soft’ salary caps did not examine the breakeven principle introduced by the FFP Regulations. There is no reliance on an actual analysis of the effect of the FFP Regulations on wages apart from in the work of Peeters and Szymanski which applied the FFP Regulations to the finances of the English Premier League clubs for the 2009–10 season. They determined that wage to turnover ratios would have fallen by as much as 15%.<sup>1154</sup> To be fair to Jemson and to Kaplan who suggested that the FFP Regulations would reduce salaries, it is important to note that their works were written in 2013 and 2015, respectively, prior to actual figures being available on the effect of the FFP Regulations,<sup>1155</sup> so they had to rely on estimations of the potential effect.

Despite being several years since the introduction of the FFP Regulations, there is still no information on their actual effect on the restriction of competition (if any) apart from the information provided by UEFA. The latter shows no negative effect on wage growth, with rises occurring each year. In 2013 and 2014, the wage growth was a little less positive at 4.0% and 3.4%, but increased in the period 2015 to 2018 to 7.6%, 8.9%, 6.7% and 9.4%, respectively.<sup>1156</sup> During that same six year period there was also a positive revenue growth

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<sup>1150</sup> Ibid 834.

<sup>1151</sup> Taormina (n 771) 1304.

<sup>1152</sup> Jemson (n 766) 20.

<sup>1153</sup> Helmut Dietl et al, ‘Welfare Effects of Salary Caps in Sports Leagues with Win-Maximising Clubs’ (Working Paper No 08-25, Institute for Strategy and Business Economics, University of Zurich, 2008) at 3–4.

<sup>1154</sup> Thomas Peeters and Stefan Szymanski, ‘Vertical Restraints in Soccer: Financial Fair Play and the English Premier League’ (Research paper 2012-028, Department of Economics, University of Antwerp, 2012) 28.

<sup>1155</sup> Jemson (n 766) 20. See also Kaplan (n 763) 832.

<sup>1156</sup> UEFA (n 985) 71.



for each year ranging from 6.8% in 2013 to a high point of 9.5% in 2016.<sup>1157</sup> Interestingly, the revenue growth for 2018 was 4.9%. Moreover, the percentage of revenue spent on wages has been relatively consistent over the period, ranging from 65.2% in 2012 to 63.9% in 2018.<sup>1158</sup> These figures suggest that the actual impact on wages from the introduction of the FFP Regulations may not be as significant as some commentators have suggested.<sup>1159</sup>

UEFA's figures indicate that the FFP Regulations have not impacted on player wages. As already discussed in Chapter 5.4, the FFP Regulations were introduced to create financial stability, not create competitive balance. UEFA was trying to improve the financial stability of European football and the FFP Regulations achieve this by implementing the breakeven and overdue payables measures. The measures are precisely the same for each club, but the effect will be different for each club based on its particular financial position. There is no attempt made to increase or decrease a club's income or expenditure and no effort made to achieve a better competitive balance between the clubs. The breakeven requirement does not appear to be an anti-competitive measure as it is applied uniformly to all clubs with the aim of obtaining the financial stability of all clubs. It promotes the status quo among clubs and, therefore, those clubs which were rich before its introduction continue to be so and those which were poor are likely to continue in that situation. This was particularly the case when the breakeven requirement was first introduced because there was no opportunity for investment. That situation changed in 2015 when supervised investment became possible in some instances by virtue of the voluntary agreement.<sup>1160</sup> The voluntary agreement has to receive UEFA's approval and supervision, but it does provide the potential for an owner to invest in their club. Therefore, in practical terms, the situation for investment is not hugely different to what it was before the FFP Regulations were introduced.

The position, therefore, is that the FFP Regulations have not really changed the football landscape greatly. The status quo has basically been maintained. The rich clubs can continue to afford large transfer fees and high wages, despite the implementation of the breakeven requirement, and there are sufficient rich clubs in Europe to create a competitive market for the best players. Furthermore, European football is generally thriving. Increasing broadcasting and sponsorship revenue means the incomes of some of the less wealthy clubs are increasing,

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<sup>1157</sup> Ibid 48.

<sup>1158</sup> Ibid 71.

<sup>1159</sup> Peeters and Szymanski (n 1155) 28. See also Helmut Dietl et al (n 1153) 3–4. See also Jemson (n 766) 20. See also Kaplan (n 763) 832.

<sup>1160</sup> See Chapter 5.4 for more information on the voluntary agreement.

allowing them to offer higher wages and larger transfer fees. The FFP Regulations have also encouraged clubs to improve their financial management and this may have helped clubs to afford increased spending on their main assets, the players.

Thus, as with the ‘object’ of restricting competition, it is difficult to determine how the ECJ would decide the issue of whether the FFP Regulations have an anti-competitive effect. The ECJ would be guided by the evidence and, although it may be fairly marginal, it is hard to imagine that there will not be some effect on the restriction of competition. The threshold for establishing a breach of Article 101(1) is relatively low and it is, therefore, possible that the FFP Regulations would be found to restrict competition.<sup>1161</sup> If so, it becomes necessary to examine Article 101(3), which, as shown in Chapter 6, provides a possible defence to breaches of Article 101(1).<sup>1162</sup>

Article 101(3) will be considered when answering the third research question in Chapter 9, but there are two other minor exemptions that can be dealt with expeditiously at this point. First, the block exemption, which applies to vertical agreements, provides an automatic exemption from Article 101(1) if applicable. However, as already discussed in Chapter 6, it is unlikely to apply to the FFP Regulations because the market share which UEFA has in European football is greater than the 30% allowable.

Similarly, the De Minimis rule applies to situations where either the aggregate market shares of the parties (UEFA and the national associations) do not exceed 10% or where the parties individually do not have shares exceeding 15% each. As already discussed in Chapter 6.7, the shares that UEFA and the national associations have in European football and its competitions far exceed the percentage levels allowed for the De Minimis rule to apply.

### 8.5 *Article 102 of the TFEU*

Article 102 ‘prohibits anticompetitive behaviour by dominant undertakings’.<sup>1163</sup> It is different to Article 101 in that ‘it restricts the autonomy that is at the heart of Article 101, forcing the dominant undertaking to adapt its actions to the lessened competition on the dominated market’.<sup>1164</sup> As discussed in Chapter 6.8, there are five main elements to Article 102: the need

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<sup>1161</sup> Nicolas Petit, ‘The Guidelines on the Application of Article 81(3) EC: A Critical Review’ (Working Paper No 4, Institut D’Etudes Juridiques Europeenes, (2009) 3.

<sup>1162</sup> *Guidelines on Art 81(3)* (n 815), para 1.

<sup>1163</sup> Martin Herz and Hans Vedder, ‘A commentary on Article 102 TFEU’ (2017)

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2977195](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977195)>.

<sup>1164</sup> *Ibid.*

for there to be an agreement between undertakings or a decision by an association; a substantial part of the internal market must be effected; the agreement must affect inter-state trade; dominance must be present; and abuse must have taken place.<sup>1165</sup> The first three elements were considered in Chapter 8.4 in the context of Article 101 and each would also apply to Article 102. That leaves the key terms ‘dominance’ and ‘abuse’ to consider. It is difficult to argue that dominance does not apply to UEFA’s position, either as an individual entity or in a collective dominance situation where UEFA links with the national associations to impose uniform conduct on its market of European football.<sup>1166</sup>

The stumbling block on whether UEFA has breached Article 102 is, therefore, abuse. Although it is not defined in the legislation its meaning has been developed by case law. In *Michelin*<sup>1167</sup> the Court determined ‘that dominant undertakings have a special responsibility not to further reduce the already weakened competition’.<sup>1168</sup> In *Hoffmann La Roche*,<sup>1169</sup> the Court stated that abuse comprised four elements: that it is ‘objective’ and does not require intention;<sup>1170</sup> it refers ‘to influence on the market structure’;<sup>1171</sup> it ‘consists of methods which run counter to normal competition’;<sup>1172</sup> and ‘the effect of the conduct forms a restriction to [the growth of the] remaining degree of competition’.<sup>1173</sup> However, the clarifications in these cases of the ambit of Article 102 do not greatly assist in determining the situation with the FFP Regulations as it is very different in nature to previous cases heard by the ECJ. UEFA’s case does not involve a commercial example of a dominant undertaking taking advantage of a weak competitor. It is an organisation that aims to bring financial stability to the football clubs which are members of the national associations it represents. These particular circumstances make it hard to conclude an abuse has taken place. Kaplan is the only commentator who maintains that abuse has occurred, and even she accepts that the main weakness of her argument is ‘that the smaller clubs and leagues did technically agree to [the FFP Regulations]’.<sup>1174</sup>

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<sup>1165</sup> Ibid.

<sup>1166</sup> Ibid 12.

<sup>1167</sup> Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (ECJ 5 October 1983) ECR 1983:313.

<sup>1168</sup> Herz and Vedder (n 1163) 15.

<sup>1169</sup> Case 85/76, *Hoffmann-La Roche & Co AG v Commission of the European Communities* (ECJ 17 January 1979) ECR 1979-00461.

<sup>1170</sup> Herz and Vedder (n 1163) 16.

<sup>1171</sup> Ibid.

<sup>1172</sup> Ibid 17.

<sup>1173</sup> Ibid.

<sup>1174</sup> Kaplan (n 763) 848.

## 8.6 Conclusion

In this chapter, the applicability of Articles 45, 101 and 102 of the *TFEU* to the FFP Regulations has been examined. The FFP Regulations do not appear to breach Article 45, as they seem able to meet each of the four conditions established in the *Gebhard* case. However, it is probable that the FFP Regulations breach Article 101(1) because, although the restriction on competition which they cause may only be minor, even a small restriction could be sufficient to warrant the ECJ finding the FFP Regulations to be in breach. If that is the case, the ECJ would then consider possible exemptions to Article 101(1), Article 101(3) and the *Wouters* (ancillary restraint) exemption. These exemptions will be considered in the next chapter. The FFP Regulations do not appear to breach Article 102 as they do not constitute an ‘abuse’ as required by this Article, with UEFA having obtained support and approval for the FFP Regulations from the national associations and other key stakeholders including the football clubs, before their introduction.

## CHAPTER 9: THE FINANCIAL FAIR PLAY (FFP) REGULATIONS AND THE ARTICLE 101(3) AND THE ANCILLARY RESTRAINT EXEMPTIONS

### 9.1 Introduction

This chapter will consider whether the exemption provided by Article 101(3) and the ancillary restraint exception established in *Wouters* apply to the FFP Regulations. It will answer the third thesis question: If the FFP Regulations are in breach of Articles 101(1) and 102, do they meet the requirements to obtain an exemption under Article 101(3) or the ancillary restraint exception? Article 101(3) is discussed in Chapters 6.3 and 6.4 and the ancillary restraint exemption in Chapter 6.5. They need to be further considered because there is a likelihood that the FFP Regulations breach Article 101(1) which means that, if the FFP Regulations are to be held valid, one of these two exceptions must apply.

It is interesting to note that the Article 101(3) and ancillary restraint exemptions apply to Article 102 as well as to Article 101(1), even though there is no mention of that in the *TFEU*. The ECJ utilises the concept of objective justification, coupled with the proportionality test, instead of the ancillary restraints doctrine, although both concepts perform exactly the same function.<sup>1175</sup> There is also the possibility of using an Article 101(3) exemption by demonstrating that substantial efficiencies outweigh any anti-competitive effect.<sup>1176</sup> It is likely, however, that the exemptions will not be needed in respect of Article 102 as the FFP Regulations do not appear to breach of Article 102 as discussed in Chapter 8.5. Consequently, the discussion in this chapter will focus exclusively on the Article 101(3) and ancillary restraint exemptions in relation to Article 101(1), whilst acknowledging that, if required, they could be applied in a similar manner to Article 102.

Both exemptions require the ECJ to consider whether there is a more appropriate and less restrictive restraint. Consequently, this chapter will also review the other available restraints to ascertain whether one or more of them would be more appropriate than the FFP Regulations. The restraints will be considered against three main criteria: their acceptability to major stakeholders, their potential for implementation and workability, and their likely compliance with ECL.

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<sup>1175</sup> Herz and Vedder, above n 1163, 3.

<sup>1176</sup> *Art 82 enforcement priorities* (n 905), para 28.

## 9.2 *Article 101(3) Exemption*

Article 101(3) considers the positive elements of the agreement under review. To obtain an exemption from Article 101(1), four conditions contained in Article 101(3) need to be met: efficiency gains; fair share for consumers; indispensability of the restrictions; and no elimination of competition. Before considering these four conditions, a general point needs to be made.

Although guidelines are provided to assist in the interpretation of Article 101(3), they are similar to the guidelines provided for Article 101. They are economic in nature and are a ‘set of vague self-assessment standards which must be applied on a case-by-case basis’.<sup>1177</sup> They involve a balancing test to examine whether an agreement’s pro-competitive benefits outweigh its anti-competitive effects with a sliding scale approach being used to determine whether the efficiencies calculated under Article 101(3) are greater than the restriction on competition under Article 101(1).<sup>1178</sup> It is a relatively hard task to quantify the losses under Article 101(1) and the gains under Article 101(3) when quantitative financial data for those losses and gains is available. However, where qualitative standards apply, the task becomes even more difficult as it lends itself to an outcome based on a ‘value judgment’.<sup>1179</sup> In a case like UEFA’s FFP Regulations, where a similar fact situation has not been previously considered by the ECJ and where qualitative standards apply, it is extremely difficult to predict the ECJ’s decision.

The first condition to be met is efficiency gains. The FFP Regulations satisfy this requirement. UEFA is aiming to bring financial stability to football in Europe, with the efficiency of the FFP Regulations being more qualitative than quantitative, although the qualitative efficiencies may have some indirect financial benefits. With rivalry between sports being inherently competitive it is crucial for any sport’s development that it maintains a good public image and integrity. That could be tarnished with the financial collapse of a football club and damage the particular competition to which the club was affiliated. New entrants to the sport, either at a playing or supporting level, are likely to provide some economic benefits, at least in the long term. However, it may be difficult to quantify those gains, at least initially, from a financial perspective. Notwithstanding this, the FFP Regulations appear to be achieving their aim and UEFA is in a position to demonstrate this financially. Its financial information shows

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<sup>1177</sup> Petit (n 1161) 4.

<sup>1178</sup> Ibid.

<sup>1179</sup> Ibid 5.

that outstanding debt levels are significantly less than before the FFP Regulations were introduced. Further, although wage levels appear to be rising, their increase appears to be reasonably consistent, under control, and generally not exceeding revenue increases.<sup>1180</sup> As discussed in Chapter 6.3, the majority of commentators including Kaplan,<sup>1181</sup> Jemson,<sup>1182</sup> Taormina<sup>1183</sup> and Bastianon,<sup>1184</sup> agree with this view although Jemson and Bastianon both point out that UEFA still has to produce evidence to substantiate the position. This latter point is acknowledged, but it does appear that UEFA has the ability to do that.

The second condition relates to a fair share for consumers. As discussed in Chapter 6.3, the term ‘consumers’ is given a wide meaning and includes all direct and indirect users of the product, which is European football.<sup>1185</sup> This ties in with UEFA’s mandate, which includes looking after all layers of European football, including the ‘grassroots’ level. It is also important because consumers can be seen to go beyond just football clubs, their owners, players and supporters to include a much wider range of football consumers. The Guidelines also make it clear that consumers do not have to receive a share of each and every efficiency so long as ‘sufficient benefits are passed on to compensate for the negative effects of the restrictive agreement’.<sup>1186</sup> Further, the decisive factor is the impact on consumers as a whole and not on individual groups of consumers.<sup>1187</sup>

Consumers generally benefit from the better environment derived from the greater financial stability that the FFP Regulations have provided. For instance, supporters of a particular club, as consumers, benefit in that they do not have to concern themselves with the possible demise of their club from overspending, or whether the competition in which their club plays is going to suffer due to the withdrawal of a rival club as a result of financial problems. Nonetheless, Kaplan argues that consumers would not benefit from the FFP Regulations and may actually incur additional cost because clubs might increase ticket and merchandise prices to assist them to meet their breakeven commitment.<sup>1188</sup> It is difficult to contradict this completely but there is no need for this to occur. The vast majority of clubs have managed to meet the breakeven

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<sup>1180</sup> UEFA (n 985) 71.

<sup>1181</sup> Kaplan (n 763) 836.

<sup>1182</sup> Jemson (n 766) 45.

<sup>1183</sup> Taormina (n 771) 109.

<sup>1184</sup> Bastianon (n 608) 37.

<sup>1185</sup> *Guidelines on Art 81(3)* (n 815), para 84. The term includes those people who not only attend the matches but also those who watch the matches via media outlets.

<sup>1186</sup> *Ibid* para 86.

<sup>1187</sup> *Ibid* para 87.

<sup>1188</sup> Kaplan (n 763) 836.

requirement and UEFA figures show revenues generally to be rising due to the increase in broadcasting revenue.<sup>1189</sup>

Jemson and Bastianon also raise concerns about the benefits to consumers. Bastianon suggests that reduced salaries would see an exit of the high calibre players from European football.<sup>1190</sup> Jemson maintains that competitive balance would be adversely affected by the breakeven requirement with the larger clubs having more to spend on better players.<sup>1191</sup> Taormina suggests that the earning power of players would be limited in that clubs would have less funds available for wages.<sup>1192</sup>

Despite Bastianon's concerns, there has not been an exodus of players from European football. The vast majority of the best players appear to appreciate that, not only does European football pay reasonable wages, it also provides some of the most competitive playing conditions in the world. UEFA's figures also support the contention that wages have continued to increase since the introduction of the FFP Regulations.<sup>1193</sup> Taormina acknowledges this but suggests that the rise is due to increased television revenue, which may in part be true, but it hardly suggests that players' earning power is limited. Further, it should also be noted that the breakeven requirement has an inbuilt flexibility in that the wealthy clubs have funds to pay high wages, which would not be the case if a hard salary cap was in place.

Jemson's point on competitive balance can also be questioned. The FFP Regulations do not widen the gap between the clubs. They simply prohibit clubs from spending more than they earn. If clubs did not have to meet this requirement, wealthy clubs would have no restriction on their spending, which could give some of them an even greater financial advantage over clubs with more limited spending capacity. Admittedly, the FFP Regulations will not assist competitive balance and the larger clubs will still have more to spend than poorer ones, but the situation will certainly not be any worse than it would have been without any regulations at all.

The second condition also includes a sliding-scale in its assessment, so the greater the restriction on competition found under Article 101(1), 'the greater must be the efficiencies

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<sup>1189</sup> UEFA (n 985) 78.

<sup>1190</sup> Bastianon (n 608) 37.

<sup>1191</sup> Jemson (n 766) 45–46.

<sup>1192</sup> Taormina (n 771) 1309.

<sup>1193</sup> UEFA (n 985) 71.



and the pass-on to consumers'.<sup>1194</sup> It has already been argued in Chapter 8.4 that the restriction under Article 101(1) is relatively minor, so the pass-on benefit does not have to be very large. The major pass-on benefit to consumers in this instance is the greater financial stability of football clubs and the greater protection and well-being that this provides to the competitions in which the clubs compete. This benefit, by itself, seems to be a valuable advantage to consumers which may well be worth the restrictions that the FFP Regulations may cause. It should also be noted that the overall purpose of Article 101(1) is to prevent anti-competitive agreements, so the net effect only has to be neutral from the consumers' perspective.<sup>1195</sup> This means that when the positive effects of the agreement balance and compensate the negative elements, the consumer is not harmed, so it is deemed acceptable. It is only when the consumers are worse off that the second condition is not fulfilled.<sup>1196</sup> In the case of the FFP Regulations, the condition appears to have been met.

The third condition is the indispensability of the restrictions. This means that the agreement 'must not impose restrictions, which are not indispensable to the attainment of the efficiencies created by the agreement'.<sup>1197</sup> In other words, the restrictions must be needed to achieve the required efficiencies. A key determinant is whether the restrictions make it possible to achieve the outcome sought more efficiently than would have been the case without them.<sup>1198</sup> There is also a need to show that the efficiencies could not have been achieved by less restrictive agreement. It may be possible to establish these matters although, as indicated in Chapter 6.3, Kaplan,<sup>1199</sup> Lindholm,<sup>1200</sup> Taormina,<sup>1201</sup> and Bastianon<sup>1202</sup> consider that there are less restrictive ways of achieving the efficiencies. Jemson, by contrast, maintains that the FFP Regulations are the most efficient method of achieving the level of financial stability required.<sup>1203</sup> This issue will be further examined later in this chapter when consideration is given to whether there are better and less restrictive restraints that are viable alternatives to the FFP Regulations.

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<sup>1194</sup> *Guidelines on Art 81(3)* (n 815), para 90.

<sup>1195</sup> *Ibid* at [85].

<sup>1196</sup> *Ibid*.

<sup>1197</sup> *Ibid* at [73].

<sup>1198</sup> *Ibid* at [74].

<sup>1199</sup> Kaplan (n 763) 837.

<sup>1200</sup> Lindholm (n 167) 205–208.

<sup>1201</sup> Taormina (n 771) 1311. Taormina favours a hard salary cap, which he maintains would probably be equally as efficient as the breakeven requirement, but with less pressure on competition.

<sup>1202</sup> Bastianon (n 608) 37.

<sup>1203</sup> Jemson (n 766) 47.

The fourth condition requires that the agreement must not eliminate ‘competition in respect of a substantial part of the products in question’.<sup>1204</sup> This takes into account the ultimate aim of Article 101 which is ‘to protect the competitive process’. Competition is given priority over efficiency gains because it drives efficiency. If competition is eliminated, there is a likelihood that it will fall away under a monopoly environment.<sup>1205</sup> As already discussed in Chapters 5.4 and 7.2, this situation changed in 2015 when UEFA introduced its voluntary agreement, which allowed owners to exceed their club’s breakeven requirement. This change occurred after the views of a number of commentators had been published, with Kaplan,<sup>1206</sup> Jemson,<sup>1207</sup> and Long<sup>1208</sup> all forming the opinion prior to the introduction of the voluntary agreement that the FFP Regulations had eliminated competition and that UEFA could not rely on Article 101(3). However, the current position may not be as straightforward and the matter deserves further examination.

Prior to the introduction of the FFP Regulations, there were three owners who had managed to purchase an already existing strong club and take it to the upper echelons of European football. These were Sheikh Mansour at Manchester City,<sup>1209</sup> Roman Abramovich at Chelsea,<sup>1210</sup> and the State of Qatar, through its shareholding organisation, Qatar Sports Investments, at PSG.<sup>1211</sup> The common feature which each of these owners share is immense wealth. Other rich investors have tried but, without the same financial resources, have not had the same degree of success. An example is David Whelan who owned Wigan Athletic.<sup>1212</sup> Other investors have fared even worse, including Alexandre Gaydamak who owned Portsmouth which won the FA Cup in 2008 but then entered voluntary administration in 2010 and 2012 and is currently playing in the third tier of English football.<sup>1213</sup> The main purpose

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<sup>1204</sup> Article 101(3), *Treaty on the Functioning of the European Union* 115, 9/5/2008 P.0088-0089.

<sup>1205</sup> *Guidelines on Art 81(3)* (n 815), para 105.

<sup>1206</sup> Kaplan (n 763) 837.

<sup>1207</sup> Jemson (n 766) 47.

<sup>1208</sup> Long (n 1008) 99.

<sup>1209</sup> Since Sheikh Mansour’s acquisition, Manchester City has won four English Premier Leagues and two FA Cups and is ranked within the top ten clubs in Europe according to UEFA’s rankings.

<sup>1210</sup> Since Roman Abramovich’s purchase of Chelsea in 2003, the club has won both the English Premier League and the FA Cup on five occasions, the UEFA Champions League once and the UEFA Europa League twice. Chelsea is currently ranked within the top 15 clubs in Europe according to UEFA’s rankings.

<sup>1211</sup> Since Qatar Sports Investments purchased the club in 2011, PSG has won the French La Ligue each year and also won the Coupe de France on four occasions and the Coupe de la Ligue five times. PSG is currently ranked within the top ten clubs in Europe according to UEFA’s rankings.

<sup>1212</sup> ‘Dave Whelan looks back on 23 proud years of Wigan Athletic ownership’, *Wigan Athletic* (Web Page, 2 November 2018) <<https://wiganathletic.com/news/2018/november/watch-dave-whelan-looks-back-on-23-proud-years-of-wigan-athletic-ownership/>>.

<sup>1213</sup> Nabil Hassan, ‘Portsmouth come out of administration’, *BBC Sport* (Web Page, 20 April 2013) <<https://www.bbc.com/sport/football/21574331>>.

of the FFP Regulations was to prevent this occurring again. This accounts for the careful monitoring and supervision of owners, who now enter into voluntary agreements with UEFA.

Investment is not as relaxed as it was before the FFP Regulations and this was what UEFA wanted. However, the opportunity for owners to invest is now available under the voluntary agreement. Since this is the case, the FFP Regulations do not eliminate ‘competition in respect of a substantial part of the products in question’ with there being a clear reasoning about why UEFA has imposed the strict rules and requirements to its voluntary agreement. Taormina, writing more recently than the earlier commentators, also suggests that the FFP Regulations would meet this condition because ‘the breakeven requirement...does not eliminate the competition for players’. Although he does not refer to the voluntary agreement he places emphasis on the fact that although the FFP Regulations restrict ‘equity partner and related party investments’ it does not restrict other areas like ‘match-day income, TV broadcasting rights, and sponsorship and commercial income’.<sup>1214</sup> Taormina’s view is correct and in conjunction with the availability of the voluntary agreement indicates that the fourth condition is met.

### 9.3 *Ancillary Restraint (Wouters) Exemption*

The ancillary restraint or ‘*Wouters*’ exemption was discussed in Chapter 6.5 and is often seen as similar to the Article 101(3) exemption, however, it is noticeably different. Whereas the Article 101(3) exemption is economically based and compares pro and anti-competitive effects relating to an agreement to determine whether it is economically appropriate for the agreement to proceed, the ancillary restraint exemption looks more generally at the agreement, often taking into account the public interest perspective, to decide if the agreement should be validated.<sup>1215</sup> The ancillary restraint exemption involves consideration of three areas: legitimacy, necessity and proportionality.<sup>1216</sup>

In deciding whether the ECJ is likely to apply the ancillary restraint exemption to the FFP Regulations, it is important to examine the cases where this exemption has been considered. The first sports example was *Meca-Medina*<sup>1217</sup> in 2004, where two long-distance swimmers sought to contest their two year bans for taking performance-enhancing drugs. The ECJ,

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<sup>1214</sup> Taormina (n 771) 1312. See also Stefano Bastianon, ‘The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout?’ (2015) 11(1) *The Competition Law Review* 7.

<sup>1215</sup> *Guidelines on Art 81(3)* (n 815), para 30.

<sup>1216</sup> *Ibid* para 29.

<sup>1217</sup> *Meca-Medina* (n 738). See also pp 112–113 above.

following the earlier decisions of *DLG*<sup>1218</sup> and *Wouters*,<sup>1219</sup> applied the three conditions, finding that there was no breach of Article 81(1) as the enforcement of anti-doping rules was justified as a legitimate objective to protect the integrity of the sport and the restrictions imposed by the rules were limited to what was necessary and proportionate.<sup>1220</sup> The ECJ determined that the threshold of 2 ng/ml of urine above which the presence of nandrolene in an athlete's body constituted doping was fair.<sup>1221</sup> Since the appellants had not pleaded that the penalties were excessive, the ECJ held that it had not been established that the anti-doping rules were disproportionate.<sup>1222</sup>

Subsequent sports cases, although conducted in the Court of Arbitration for Sport (CAS) and by the European Commission, show that the three conditions of legitimacy, necessity and proportionality were being applied consistently. In *AEK Athens and Slavia Prague v UEFA*,<sup>1223</sup> a conflict of interest occurred where ENIC, a company listed on the London Stock Exchange, owned more than a 50% stake in two teams, Slavia and AEK, which were qualified to play in the 1998–99 UEFA Cup.<sup>1224</sup> UEFA maintained that this breached its Independence of Clubs rule and only allowed Slavia, with the higher club coefficient, to compete in the competition.<sup>1225</sup> ENIC took its case to CAS and also to the European Commission. CAS found that the rule was not anti-competitive<sup>1226</sup> and, although not required to do so, also confirmed that it found the rule both necessary and proportionate.<sup>1227</sup> The European Commission similarly held that the rule did not breach Article 81(1)<sup>1228</sup> and added that '[i]n any case the rule does not seem to go beyond what is necessary to ensure its legitimate aim'.<sup>1229</sup>

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<sup>1218</sup> Case C-250/92 *Gottrup-Klim Grovwareforening and Others v Danssk Landbrugs Grovvareselskab AmbA* ('*DLG*') EU:C:1994:413.

<sup>1219</sup> *Wouters* (n 849).

<sup>1220</sup> Philip Kienapfel and Andreas Stein, 'The application of Articles 81 and 82 EC in the sport sector' (2007) 3 *European Commission Competition Policy Newsletter* 6, 8.

<sup>1221</sup> *Meca-Medina* (n 738) at [53].

<sup>1222</sup> *Ibid* at [55].

<sup>1223</sup> CAS 98/200 *AEK Athens and Slavia Prague v UEFA* ('*AEK and Slavia*').

<sup>1224</sup> Tomas Grell, 'Multi-Club Ownership in European Football – Part 1: General Introduction and the ENIC Saga', *Asser International Sports Law Centre* (Blog Post, 2017) <<https://www.asser.nl/SportsLaw/Blog/post/multi-club-ownership-in-european-football-part-i-general-introduction-and-the-enic-saga-by-tomas-grell>>.

<sup>1225</sup> *Ibid* 6.

<sup>1226</sup> *AEK and Slavia* (n 1223) at [113] to [119].

<sup>1227</sup> *Ibid* at [136]. CAS also held UEFA had not breached Art 82 as UEFA was not an owner of a football club and, therefore, was not in a dominant position. See *AEK and Slavia* (n 1224) at [141].

<sup>1228</sup> European Commission, Case COMP/37 806: *ENIC v UEFA*, Rejection Letter 25/6/2002 at [40].

<sup>1229</sup> *Ibid* at [41]. The European Commission also held that UEFA Art 82(1) was not discriminatory or disproportionate. See European Commission, Case COMP/37 806: *ENIC v UEFA*, Rejection Letter 25/6/2002 at [45] and [46].

A similar outcome, however, was not found to be appropriate in the European Commission's consideration of the Eligibility Rules of the International Skating Union (ISU), which penalised athletes by effectively banning them for life<sup>1230</sup> for engaging in events not organised by the ISU.<sup>1231</sup> The Commission held that the Eligibility Rules did 'not serve purely legitimate objectives but also other interests of the ISU including its economic interests' and were 'neither inherent in the pursuit of legitimate objectives nor proportionate to achieve legitimate objectives'.<sup>1232</sup> The stark contrast between the ENIC and ISU examples reveals how feasible it is for the test (originally developed in *DRL* and *Wouters* and utilised for a sports example in *Meca-Medina*) to work successfully. The ISU example shows the importance of having a body available to monitor sporting bodies' administrative arrangements.

UEFA has been involved in three subsequent and more recent CAS examples involving Galatasaray, AC Milan and Manchester City clubs. Galatasaray had been excluded from participating in the next UEFA Club competition for which it might otherwise qualify in the next two seasons, as it had not complied with a Settlement Agreement which it had previously made with UEFA. In *Galatasaray v UEFA* ('*Galatasaray*') the club's arguments were the incompatibility of the breakeven requirement with ECL and the alleged disproportionate nature of the sanction imposed by UEFA.<sup>1233</sup> The CAS panel held that the FFP Regulations did not restrict competition and, if they did, the imposition of limits on clubs spending no more than revenue was a natural element of a financial discipline seeking the objective of financial stability.<sup>1234</sup> Further, the panel held the sanction was not disproportionate as Galatasaray had not provided supporting documents to show how alleged external factors had made it impossible to comply with the breakeven requirement.<sup>1235</sup> In addition, this was a second violation and the one season ban was held to be consistent with the principle of equal treatment and fair competition.<sup>1236</sup>

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<sup>1230</sup> The Rules provided for skaters to become ineligible for ISU competitions if they competed in unauthorised events with the athlete not being able to apply for reinstatement. This in essence meant being banned for life.

<sup>1231</sup> *International Skating Union* (n 1073) 9–12.

<sup>1232</sup> *Ibid* at [21].

<sup>1233</sup> CAS 2016/A/4492 *Galatasaray v UEFA* at [46] ('*Galatasaray*').

<sup>1234</sup> *Ibid* at [79].

<sup>1235</sup> *Ibid* at [107] to [111].

<sup>1236</sup> *Ibid* at [115].

Although the *Galatasaray* decision<sup>1237</sup> produced a successful result for UEFA, this needs to be contrasted with the subsequent *AC Milan* case,<sup>1238</sup> where, despite similar facts, the outcome was different. In *AC Milan* a major difference was that the club was not offered a Settlement Agreement, but was sanctioned for a breach of the breakeven requirement. It was excluded from participating in the next UEFA Club competition for which it qualified in the following two seasons the same penalty that Galatasaray had received. The CAS panel upheld that part of the Decision of the CFCB Adjudicatory Chamber relating to the extent of the breach of the breakeven requirement. However, it found that the Chamber had either not assessed the relevant facts correctly or that the facts had changed by the time of CAS's hearing of the matter. That meant that the sanction contained in the Decision, as it was based on incorrect determinations, was not proportionate and therefore needed to be partially annulled.<sup>1239</sup> CAS annulled the ban and referred the matter back to the CFCB Adjudicatory Chamber 'to take a proportionate decision based on the findings in this Award and a proper assessment of the facts at the relevant reference date'.<sup>1240</sup> The matter was ultimately resolved when AC Milan decided to accept a one year ban to prevent UEFA from raising further charges for breaches of the FFP Regulations. It also gave it a year's grace in which to put its accounts in order.<sup>1241</sup>

A more recent appeal case, involving Manchester City, has recently been determined by CAS. On 14 February 2020, the Adjudicatory Chamber of the CFCB issued its decision that Manchester City had breached the FFP regulations 'by overstating its sponsorship revenue in its accounts and in the break-even information submitted to UEFA between 2012 and 2016'.<sup>1242</sup> The Chamber imposed a two year ban on Manchester City participating in UEFA club competitions, a fine of €30 million and €100,000 costs.<sup>1243</sup> It should be noted that Manchester City had entered into a Settlement Agreement with UEFA in 2014 under which it accepted sporting and financial penalties, 'including a partly suspended fine, short-term

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<sup>1237</sup> *Galatasaray* (n 1233).

<sup>1238</sup> *AC Milan* (n 1065). This case has already been referred to in Chapter 7.4 when considering the FFP Regulations and governance issues.

<sup>1239</sup> *Ibid* at [157].

<sup>1240</sup> *Ibid* at [159].

<sup>1241</sup> Murad Ahmed, 'AC Milan accepts ban from Europa League competition', *Financial Times* (online at 29 June 2019) <<https://www.ft.com/content/2042a85e-99b2-11e9-9573-ee5cbb98ed36>>.

<sup>1242</sup> UEFA, 'Club Financial Control Body Adjudicatory Chamber decision on Manchester City Football Club', *UEFA.com* (Web Page, 20 February 2020) <<https://www.uefa.com/insideuefa/about-uefa/news/025a-0f8e7535cab3-07272066f9f6-1000--club-financial-control-body-adjudicatory-chamber-decision-on-ma/>>.

<sup>1243</sup> *Ibid*.

restrictions on incoming player transfers, wage bill increases, and squad composition for UEFA competitions'.<sup>1244</sup>

Further, Manchester City had already made a preliminary appeal on the matter to CAS covering several issues, including the decision by UEFA's Investigatory Chamber to refer the case to the Adjudicatory Chamber, and the Investigatory Chamber's refusal to suspend the investigation 'in order to conduct an enquiry into the repeated leaking of confidential information about the investigation to the media'.<sup>1245</sup> In its written submissions, Manchester City also alleged that the referral decision was made 'improperly and prematurely while the investigation was still ongoing' and that the Investigation and Decision lacked 'procedural fairness and due process'.<sup>1246</sup>

The CAS panel found that the referral decision to the Adjudicatory Chamber was not a reviewable decision that could be appealed to CAS because it lacked finality. It also found that the Investigatory Chamber's refusal to suspend the investigation so that the issue involving the leaking of information could be examined, did not amount to a decision so was not appealable.<sup>1247</sup> The appeal was therefore unsuccessful, but the CAS panel did state in its Award that:

Although the Panel does not exclude the possibility that one or more of [Manchester City's] rights in the proceedings before the Investigatory Chamber may not have been fully respected, the Panel has confidence that, if such procedural violations were held to exist, the Adjudicatory Chamber will right such wrongs and/or take such alleged violations into account in its decision, and if it does not, MCFC has the possibility of appealing the Adjudicatory Chamber's final decision to CAS.<sup>1248</sup>

In its final decision in *Manchester City FC v UEFA* ('*Manchester City Arbitral Award*') delivered on 13 July 2020, CAS overturned UEFA's ban and reduced the fine from €30 million to €10 million.<sup>1249</sup> CAS also ordered Manchester City to pay €100,000 towards

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<sup>1244</sup> Christopher Flanagan, 'Manchester City's Financial Fair Play ban: the legal questions and consequences' (20 February 2020) *LawInSport* <<https://www.lawinsport.com/topics/item/manchester-city-s-financial-fair-play-ban-the-legal-questions-and-consequences>>.

<sup>1245</sup> *Ibid.*

<sup>1246</sup> CAS 2019/A/6298 *Manchester City v UEFA* para 49(d) ('*Manchester City*').

<sup>1247</sup> Flanagan (n 1244) 4.

<sup>1248</sup> *Manchester City* (n 1246) para 109.

<sup>1249</sup> CAS 2020/A/6785 *Manchester City FC v UEFA* at para 343 ('*Manchester City Arbitral Award*').

UEFA's legal costs, which was the amount that UEFA had ordered Manchester City to pay in respect of costs in its original judgment.<sup>1250</sup>

The CAS panel found that the CFCB did not breach any obligations of due process<sup>1251</sup> and that the earlier Settlement Agreement did not prevent UEFA from charging Manchester City 'for the alleged breaches at stake in the present appeal arbitration proceedings'.<sup>1252</sup> UEFA's renewed interest in Manchester City occurred due to documentation being released by the 'Football Leaks' organisation<sup>1253</sup> but the leaked emails were held to comprise admissible evidence.<sup>1254</sup> That was not surprising bearing in mind UEFA's Procedural Rules that state '[a]ll means of evidence may be considered by the CFCB chief investigator'.<sup>1255</sup> Further, although CAS does not utilise a binding system of precedent, it had in past awards been prepared to accept evidence from illegitimate sources.<sup>1256</sup>

Some of the alleged breaches were held to be time-barred with the imprecise wording of Article 37 of the CFCB Procedural Rules allowing the Panel to decide that the limitation period ran from the date that proceedings were commenced and not from the start of the investigation as UEFA had argued.<sup>1257</sup> The Panel's decision seems appropriate and it was not unexpected that this issue arose because it was important to the case and CAS had previously demonstrated considerable attention to the importance of procedure in earlier cases involving AC Milan, Galatasaray and PSG.<sup>1258</sup>

The panel also found that it was 'not comfortably satisfied that Manchester City disguised equity funding from His Highness Sheikh Mansour and/or Abu Dhabi United Group Investment and Development as sponsorship income through Etihad'.<sup>1259</sup> However, the Panel

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<sup>1250</sup> Ibid.

<sup>1251</sup> Ibid at para 148.

<sup>1252</sup> Ibid at para 162.

<sup>1253</sup> This organisation began to publish confidential information concerning professional football clubs so as reveal the hidden area of football.

<sup>1254</sup> *Manchester City Arbitral Award* (n 1249) at para 108.

<sup>1255</sup> *UEFA Procedural rules governing the UEFA Club Financial Control Body (Edition 2019)* art 13(2). See also art 23 which states that '[t]he adjudicatory chamber may request either the reporting investigator or the defendant to produce such evidence as the adjudicatory chamber may consider appropriate for the determination of the case'.

<sup>1256</sup> Flanagan (n 1244) 4. Case examples include CAS 2011/A/2426 *Amos Adamu v FIFA*, CAS 2014/A/3265 *Sivasspor Kulubu v UEFA* and CAS 2014/A/3628 *Eskisehirspor Kulubu v UEFA*.

<sup>1257</sup> *Manchester City Arbitral Award* (n 1249) at para 174. Article 37 of the CFCB Procedural Rules provides that '[p]rosecution is barred after five years for all breaches of the UEFA Club Licensing and Financial Fair Play Regulations'.

<sup>1258</sup> Points of procedure, as discussed in Chapter 7.4, were raised in the *AC Milan* case with the club's appeal being partially successful and the appeals of PSG and Galatasaray were upheld against UEFA because UEFA failed to meet a 10 day review period contained in art 16(1) of its Procedural Rules.

<sup>1259</sup> *Manchester City Arbitral Award* (n 1249) at para 293.



did find that Manchester City had failed to cooperate with the CFCB's investigation by not complying 'with reasonable evidentiary requests in several respects for over one year'.<sup>1260</sup> With the Panel finding Manchester City not guilty of the more serious charge, it decided that a ban was not appropriate<sup>1261</sup> and that a €10 million fine for the obstruction of the CFCB's investigation was sufficient.<sup>1262</sup>

Although UEFA appeared to lose that case it did not receive harsh criticism from the CAS in respect of its handling of the investigation. The change in the outcome was determined by the new evidence that Manchester City provided and the validity of the FFP Regulations was not challenged. The other area that had the potential to cause difficulty was penalties, as UEFA does not have 'clear and transparent criteria'<sup>1263</sup> to show how sanctions are to be applied. There is currently nothing available apart from a list of the possible sanctions and the results of previous hearings. There are no guidelines and Bastianon has said '[t]here is no scale to measure and define the seriousness of the violation and no provision illustrating the relationship between the violation and the sanction that can be imposed'.<sup>1264</sup> In the circumstances, the reasonably severe penalty imposed on Manchester City may have caused a problem for UEFA,<sup>1265</sup> but this did not arise as Manchester City's original ban was quashed.

In assessing the cases, it is important to point out that the cases heard in CAS or by the European Commission are not binding on the ECJ. However, it is noteworthy that in the *Galatasaray* case,<sup>1266</sup> CAS found the FFP Regulations to be legitimate and necessary. Further, when the *AC Milan*<sup>1267</sup> and *Manchester City Arbitral Award*<sup>1268</sup> cases were heard, no direct issue was raised about whether the FFP Regulations complied with ECL.<sup>1269</sup> Nor could

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<sup>1260</sup> Ibid at para 326.

<sup>1261</sup> Ibid at para 334.

<sup>1262</sup> Ibid at para 335.

<sup>1263</sup> Stefano Bastianon, 'The proportionality test under Art.101(1) TFEU and the legitimacy of UEFA Financial fair-play regulations: From Meca Medina and Majcen ruling of the European Court of Justice to the Galatasaray and AC Milan awards of the Court of Arbitration for Sport', *Asser International Sports Law Centre* (Blog Post, 14 October 2018) <<https://www.asser.nl/SportsLaw/Blog/post/the-proportionality-test-under-art-101-1-tfeu-and-the-legitimacy-of-uefa-financial-fair-play-regulations>>.

<sup>1264</sup> Ibid.

<sup>1265</sup> This issue has already been discussed when answering the first research question and it was suggested that UEFA needed to consider providing guidelines as to penalties so as to ensure that clubs were aware of what to expect for breaches of the FFP Regulations and also assist the CFCB in making certain that clubs are treated fairly and equitably when they appear before it.

<sup>1266</sup> *Galatasaray* (n 1233).

<sup>1267</sup> *AC Milan* (n 1065).

<sup>1268</sup> *Manchester City Arbitral Award* (n 1249).

<sup>1269</sup> It was for this reason that the legitimacy of the FFP Regulations was not mentioned as a likely issue in the *Manchester City Arbitral Award* case. However, the issue of the settlement agreement and the lack of clarity as to its use was raised in the *AC Milan* case as discussed in the first research question earlier.

UEFA's actions in relation to the FFP Regulations be considered in the same light as the ISU case, where, as already discussed above, the decision of the ISU seemed to be tainted with self-interest.<sup>1270</sup>

CAS decisions post-date the views of some of the commentators but Kaplan<sup>1271</sup> and Jemson<sup>1272</sup> are generally agreed that UEFA's objective of protecting the financial stability of European football is legitimate. Further, Taormina, writing more recently, also considers this objective as legitimate.<sup>1273</sup> The ECJ would consider the background to the FFP Regulations including the reasons for their introduction as well as the evidence available showing the large amount of debt which clubs had prior to their introduction. It is therefore likely that the ECJ would determine UEFA's objective as legitimate, with its aim being to protect its sport, where the financial viability of the clubs is integral to achieving this.

As stated in Chapter 6.4, the restrictions imposed by the FFP Regulations appear necessary to achieve UEFA's objectives. They are reasonable because expecting clubs to spend only what they earn and pay their debts within an acceptable time period are justifiable expectations for UEFA to apply in meeting its objective. Nevertheless, there is mixed opinion among the commentators. Kaplan<sup>1274</sup> submits that the breakeven requirement is not an appropriate method to utilise and that there are better options to engage, whereas Jemson proposes that 'a court will likely conclude that the restrictions on spending in the FFP regulations are inherent in achieving the aim of long-term financial stability'.<sup>1275</sup> Taormina takes a similar view to Jemson.<sup>1276</sup>

The proportionality or reasonableness of the restriction is the third consideration. The FFP Regulations appear proportionate as they have been successful in curbing financial excess, whilst only having a limited impact on competition from both a sporting and legal perspective. As indicated in Chapter 6.4, commentators are divided with Jemson<sup>1277</sup> and Flanagan<sup>1278</sup>

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<sup>1270</sup> *International Skating Union* (n 1073). The European Commission's decision was endorsed by the General Court of the European Union in December 2020. See Case T-93/18 *International Skating Union v Commission* (2020) ECLI:EU:T:2020:610.

<sup>1271</sup> Kaplan (n 763) 837–839.

<sup>1272</sup> Jemson (n 766) 24–42.

<sup>1273</sup> Taormina (n 771) 1305.

<sup>1274</sup> Kaplan (n 763) 838. See also Chapter 6.4.

<sup>1275</sup> Jemson (n 764) 28. See also Chapter 6.4.

<sup>1276</sup> Taormina (n 771) 1305. See also Chapter 6.4.

<sup>1277</sup> *Ibid* 42.

<sup>1278</sup> Flanagan (n 12) 163.

arguing that the restrictions are reasonable while Kaplan,<sup>1279</sup> Lindholm,<sup>1280</sup> Taormina,<sup>1281</sup> and Bastianon<sup>1282</sup> suggest there are more proportionate alternatives. The issue of proportionality will be further considered later in this chapter when possible alternatives are discussed.

Thus far it seems that the two exemption possibilities of Article 101(3) and the ancillary restraint exception should apply to legitimise the FFP Regulations. However, both exemptions would need to overcome one further hurdle. Article 101(3) is economically based in its outlook with its third condition relating to the indispensability of the restriction. It is, therefore, necessary to determine whether there is a better or less restrictive restraint available that could be used as an alternative. For the ancillary restraint exemption to apply it is necessary to show that the FFP Regulations are proportionate. Therefore, it must be determined whether the FFP Regulations are the most appropriate measure to achieve UEFA's aim of financial stability or whether there is an alternative measure(s) which would be less restrictive. In essence, therefore, although the Article 101(3) and the ancillary restraint exemptions are considered from the different perspectives of economics and public interest, the final requirement which the exemptions need to meet is basically the same: whether there is a better less restrictive alternative that could be used to obtain the same result.

However, before embarking on this examination it is important to differentiate between the terms 'financial stability' and 'competitive balance'. Financial stability entails ensuring that clubs are operated in a financially sound and prudent manner with the aim of preventing them over-spending and going into liquidation. Competitive balance, on the other hand, refers to the imposing of restraints, often financial, on clubs to gain a more even playing strength with the aim of securing more competitive games and a more even competition overall. The two terms can be considered separately but in practice there is an interconnectedness because they overlap. A competitive balance measure can provide some financial stability, but not as much as a measure specifically established for this purpose. Similarly, financial stability may have some effect on competitive balance through the restrictions it imposes, but it will be limited because competitive balance is not its main objective. This distinction between the two terms is important when looking at the alternative measures because, in most cases, the main purpose

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<sup>1279</sup> Kaplan (n 763) 838–839.

<sup>1280</sup> Lindholm (n 167) 212.

<sup>1281</sup> Taormina (n 771) 1305.

<sup>1282</sup> Bastianon (n 608) 37.

of those measures is competitive balance, whereas the main purpose of the FFP Regulations is financial stability.

#### 9.4 *Alternatives to the FFP Regulations*

There are a number of options that have either been used in the past or are currently used in other sporting competitions that could be potential alternatives to the FFP Regulations. They fall into two groups: the first consisting of options to restrict player movement, and the second involving the use of financial restraints. These alternative options were outlined in Chapter 3. That discussion of each option is developed below. In particular, both groups will be examined from the perspectives of practicality and legality. Practicality covers two issues: whether it is practical to implement the option into the European football setting; and whether the stakeholders involved in European football would be prepared to accept the option. Legality refers to whether the option would comply with ECL.

##### 9.4.1 *Alternative Player Movement Restraints*

###### 9.4.1.1 *Retain and Transfer Rule*

The retain and transfer rule, where players are required to remain attached to their club after their contract with that club had expired, has been used in European football in the past. It would be inappropriate and wholly impracticable to attempt to return to this rule, with the players not being prepared to accept it because it fails to acknowledge the normal principles of contract law which provide for freedom of contract. Further, from a legal perspective, the rule was held to be illegal by the European Court in the *Bosman* case.<sup>1283</sup>

###### 9.4.1.2 *The Zoning System*

In other sports other methods of restricting player movement have been utilised. The zone system was used in Australia in the Victorian Football League (VFL) with metropolitan zoning commencing in 1897 and country zoning starting in 1968. It operated on the basis that a player's club was determined by where he lived. It is no longer used in Australia because, as discussed in Chapter 3.2.1, it was held to be illegal in *Hall*<sup>1284</sup> and *Foschini*.<sup>1285</sup> It would also be pointless and completely impracticable to try to re-establish this method of player movement control as key stakeholders, particularly the players, would not agree to this arrangement. It would also be impossible to implement and administer effectively in a

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<sup>1283</sup> *Bosman* (n 81).

<sup>1284</sup> *Hall* (n 94).

<sup>1285</sup> *Foschini* (n 96).

European situation where football is played in over 50 countries and where ECL promotes the free movement of European citizens between member countries. The concept of zoning has now been replaced by more sophisticated methods of restricting movement in the form of quotas and draft systems. They look at the whole player pool with a view to equalising the talent and to spread it across the various teams in the competition. Whereas the zone system tended to rely on dividing the playing talent by geographical areas, which was an arbitrary and imprecise way of managing playing talent.

#### *9.4.1.3 Draft System*

The draft system is used in both the National Football League (NFL) and the Australian Football League (AFL). However, it is probable that there would be considerable practical issues with introducing it into European football. The large number of clubs involved, playing in different leagues and spread over 55 countries, would make it impossible to administer. It could perhaps be conducted on an individual country by country basis but even this arrangement would encounter difficulties because the majority of UEFA's member countries have a number of different leagues with promotion and relegation between them. A player draft probably works to best advantage when it is confined to a set number of clubs in a closed competition, such as the NFL in the US, where there are 32 teams, and the AFL in Australia, where there are 18 teams.

Further, it is most unlikely to find any support for a draft system amongst UEFA's principal stakeholders. National associations and the football clubs which are their members are unlikely to welcome the intrusion of a player draft. It would be seen as an invasion of their autonomy and would probably be resisted by the clubs. European football clubs are used to obtaining their players through the transfer market, or through the development of their individual youth academies, and would be most unlikely to accept the concept of a draft system that restricts their ability to build their own playing squads. The players would also not be receptive to a draft where potential restrictions, not only to their playing arrangements, but also to their incomes, would almost certainly arise. The current arrangements for employing players in European football have been in place for many years and it is difficult to see stakeholder groups welcoming such a cataclysmic change to their established processes.

From a legal perspective, it is important to note that the European Union was set up with the aim of bringing member countries of the Union together so that these countries could act as one. One of the main principles of the Union is that individuals of each member country

should have the right to travel freely between the member countries and live and work in the member country of their choice.<sup>1286</sup> The concept of a player draft would severely impinge on these rights and it is most unlikely that a European Court would sanction a player draft in the European Union.

#### 9.4.1.4 Quota System

The quota system is another form of player movement control and, similar to the draft system, it is still used today. Racial quotas are utilised in South African sport and as discussed in Chapter 3.2.5, a non-racial quota system was used by the NZRFU in 1995 to protect its NPC. That use was authorised by the Commerce Commission under s 58 of the *Commerce Act 1986* (NZ). However, the implementation of a similar quota system for European football is likely to suffer from precisely the same practical problems that the draft system would experience. There would be similar objections to its use from key stakeholders, the players and the clubs. From a legal perspective it is also doubtful that the ECJ would be prepared to sanction a quota system. In the *Bosman* case, for instance, as discussed in Chapter 8.3, the ECJ found that UEFA's quota on clubs playing foreign players was illegal and it is likely that any form of quota would therefore be seen by the ECJ as preventing the rights of European people to work in the country of their choice.<sup>1287</sup>

Thus, any system to provide financial stability by restricting player movement other than the current transfer system is highly impractical and probably unlawful in that it would breach Article 45 of the *TFEU*. Hence, any alternative to the FFP Regulations would have to come from the second group, financial restraints.

### 9.4.2 Alternative Financial Restraints

#### 9.4.2.1 Maximum Wage

A maximum wage involves not paying any player, in a competition where the rule applies, a sum over an agreed maximum amount. It was used successfully at first in the EFL but by the late 1950s, as the competition grew in stature, players began to question the need for, and fairness of, a maximum wage rule. The players threatened strike action and the maximum wage was withdrawn in 1961. Even though the implementation of a maximum wage in

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<sup>1286</sup> Article 45 of the *TFEU*. See Chapter 6.9.

<sup>1287</sup> However, it should be noted that clubs playing in UEFA competitions have been subjected to UEFA's Homegrown Player Rule since the 2008–09 season, which requires that eight out of a club's pool of 25 players must have been trained by clubs from the same national league with four of them from the club's own youth system. Stakeholders may have been agreeable to this quota but it does not necessarily mean that the European Court would approve it, if it were challenged.

UEFA's member countries could be possible it would not operate successfully for several reasons. First, the players would not accept such an arrangement, just as their EFL predecessors were not prepared to accept it in the late 1950s. Players would refuse to play under such terms and would look to play in other competitions where a maximum wage restriction did not apply. Secondly, the clubs, particularly the larger ones, would not be prepared to accept a restriction either as they would see the maximum wage as eroding their ability to entice the better players to play for them. Thirdly, sponsors and media outlets would be concerned at the potential decline in player talent availability and how this might reduce public interest in the competition. Fourthly, the maximum wage has already been held to be a restraint of trade in *Johnston*<sup>1288</sup> and it is probable that using it would be declared unlawful if it were ever reintroduced and challenged.

#### 9.4.2.2 Salary Cap

A salary cap, where clubs are specified a total amount they can spend on player wages, may be a more appropriate restraint. It has greater potential than the maximum wage to achieve competitive balance since a similar spend by the clubs on player wages should, in the normal course of events, lead to a more equal spread of talent between the competing teams. A salary cap also assists financial stability by providing a limit on the amount a club can spend on player wages. Bearing in mind that player wages are the largest expenditure item a club has, a reduction in spending in this area would reduce a club's total outgoings and would, therefore, diminish its risk of financial problems. The NRL provides a successful example, using only the salary cap itself and limited revenue sharing in the form of a \$13 million grant per annum to each of the 16 clubs from the NRL administrative body as a share of the broadcasting revenue and league sponsorship that is negotiated collectively.<sup>1289</sup>

Several commentators see the salary cap as being, potentially, a better alternative to UEFA's dilemma than the FFP Regulations. Flanagan has stated that 'the introduction of a fixed payroll cap...would introduce parity – 'fairness' – in terms of distributable financial resources. It

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<sup>1288</sup> *Johnston* (n 156).

<sup>1289</sup> Michael Chammas, 'Loss of respect has made ARLC chairman John Grant's position near untenable', *Sydney Morning Herald* (online at 19 May 2017) <<https://www.smh.com.au/sport/nrl/loss-of-respect-has-made-arlc-chairman-john-grants-position-near-untenable-20170518-gw7z36.html>>. The NRL has produced seven different winners in the last 10 years and in the 2018 season '29% of NRL matches [were] decided by four points or less and only two competition points separat[ed] the top eight teams'. See Brad Walter, 'NRL announces \$46 million profit for 2018', *NRL.com* (Web Page, 28 February 2019) <[https://www.nrl.com/news/2019/02/28/nrl-announces-\\$46-million-profit-for-2018/](https://www.nrl.com/news/2019/02/28/nrl-announces-$46-million-profit-for-2018/)>.

would also introduce the sort of financial rationality that UEFA seek.’<sup>1290</sup> Lindholm has maintained that ‘an absolute salary cap would both solve the root cause of inequitable resources and promote competitive balance’.<sup>1291</sup> Serby says that ‘[t]here is an obvious alternative to the soft salary cap of the ‘break-even’ rule: the ‘hard’ salary cap.’<sup>1292</sup> Other commentators, including Taormina,<sup>1293</sup> have also suggested the use of a salary cap and it is probably fair to say that a salary cap may be a viable option if the main concern is competitive balance. The FFP Regulations, which do not limit salary payments, do not greatly assist competitive balance. A salary cap would also provide some financial stability but would not be as effective in this area as the FFP Regulations because it would control only one area of expenditure whereas the FFP Regulations regulate income and expenditure.

Kaplan, however, suggests that ‘a hard salary cap... might be too much of a radical change’.<sup>1294</sup> This is a valid point as a salary cap could be viewed by some stakeholders as being over-regulatory in a sport not used to fiscal controls. Furthermore, there are a number of issues that the introduction of a salary cap would have to overcome if it was to work successfully. They include its implementation, its acceptance by stakeholders, and its compliance with ECL. It should be noted that salary caps have generally been introduced into closed competitions where the clubs remain constant, with no promotion or relegation between the league divisions. This is not the case in European football and that has the potential to make the introduction of a salary cap more challenging. However, the entry and exit of teams from the league division to which the salary cap applies would not necessarily be an insurmountable impediment that could not be covered in the salary cap rules.

A more substantial complication is the huge disparity in revenue generated by clubs in UEFA member countries. The EPL’s revenue, for instance, amounts to €5,340 million, whereas Gibraltar’s income from its Premier League (now the Gibraltar National League) is only €1.8 million.<sup>1295</sup> Clearly, with these large discrepancies, any generally imposed salary cap to be

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<sup>1290</sup> Flanagan (n 12) 163. Flanagan does acknowledge that ‘[a] payroll cap may have its own attendant legal problems’.

<sup>1291</sup> Lindholm (n 167) 210.

<sup>1292</sup> Serby (n 813) 50.

<sup>1293</sup> Taormina (n 771) 1322. See also Brian Bodansky, ‘Kicking the Penalty: What the European Court of Justice should allow Salary Caps in UEFA’ (2013) 36(1) *Fordham International Law Journal* 160. See also Valerie Kaplan, ‘UEFA Financial Fairplay Regulations and European Union Antitrust Law Complications’ (2015) 29(4) *Emory International Law Review* 799, 854. Kaplan does acknowledge that ‘a hard salary cap...might be too much of a radical change’.

<sup>1294</sup> Kaplan (n 763) 854.

<sup>1295</sup> UEFA (n 985) 68–69. It should also be noted that five countries have aggregate revenue over €1,600 million with 35 member countries having aggregate revenue sums of €89 million or less.



applied across all UEFA member countries is not going to be practically possible or effective. Thus any implementation would need to be introduced on an individual national league basis. However, even this type of arrangement would be extremely difficult to implement as the incomes of the clubs in many of the national leagues vary considerably. In the EPL, for instance, Manchester United's revenue was £629 million in 2018–19 whereas Huddersfield's revenue was only £122 million.<sup>1296</sup> In the Bundesliga, in 2016–17, FC Bayern Munich's revenue amounted to €587.8 million in contrast to €60.1 million for Hertha BSC.<sup>1297</sup> In Spain, La Liga places limits on what each club can spend on players and coaching staff. Real Madrid's revenue for the 2020–21 season was €468.5 million compared to €34.6 million for Elche CF.<sup>1298</sup>

For a salary cap to be effective in providing competitive balance to a national league, the salary cap would need to be close to what the poorer teams in the competition can afford to spend on player salaries. Hence, all the clubs in the national league would have approximately the same amount to spend and this would provide the best opportunity of providing a competition of equal playing strength. The further away the salary cap amount moves from the amount that the poorer clubs can afford, the less even the playing strengths of the clubs are likely to be. For example, La Liga has stipulated that Elche CF can spend up to €34.6 million on salaries so this would lead to all other clubs in the league including Real Madrid (currently allowed €468.5 million) being restricted to a similar amount.<sup>1299</sup> In the 2018–19 EPL season, Cardiff City spent £54 million on wages so any salary cap limit would need to

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<sup>1296</sup> 'World in motion Annual Review of Football Finance 2020', *Deloitte* (Web Page, June 2020) 19 <<https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/annual-review-of-football-finance.html>>.

<sup>1297</sup> Evgeniya Koptuyug, 'Revenue of the football clubs of the first Bundesliga in Germany in 2016/2017 (in million euros)', *Statista* (Web Page, 2018) <<https://www.statista.com/statistics/591201/bundesliga-revenue-football-clubs-germany/>>.

<sup>1298</sup> Samindra Kunti, 'La Liga salary cap cuts club spending by more than €600m with Barca hardest hit', *Inside World Football* (Web Page, 18 November 2020) <<http://www.insideworldfootball.com/2020/11/18/laliga-salary-cap-cuts-club-spending-e600m-barca-hardest-hit/>>. In 2019–20, Barcelona was able to spend €671 million with the bottom club, Real Mallorca, on a figure of €29.9 million. See Bobby McMahon, 'Barcelona's salary limit for this season set at \$738 million, \$33m more than Real Madrid', *Forbes* (Web Page, 10 September 2019) <<https://www.forbes.com/sites/bobbymcmahon/2019/09/10/barcelonas-salary-limit-for-this-season-set-at-738m-33m-more-than-real-madrid/?sh=19f433b45b49>>. Barcelona's spending figure was cut by almost €300 million for the 2020–21 season with other clubs in La Liga also receiving reductions. The reductions were said to be caused by the Coronavirus pandemic. See Kunti, (n 1298) 2.

<sup>1299</sup> *Ibid.*

be close to this amount for all Premier League clubs if parity in spending were to be achieved.<sup>1300</sup> However, in the same season, Manchester United spent £352 million.<sup>1301</sup>

Any attempt to implement a salary cap into the national leagues of UEFA member countries is likely to have major impacts on two main stakeholder groups, the players and the wealthy clubs. The players are unlikely to accept the huge wage cuts that many of them would be expected to take if a salary cap limit were introduced, particularly if it was calculated on the basis of trying to bring parity to the wage spending of each club in a national league. Even, a token salary cap, reducing the limit of spending on player wages of the top clubs by, say, €50 million each, is unlikely to be acceptable to players and, while causing considerable unrest amongst the players, would have a minimal impact on competitive balance. The players would also be likely to resist any salary cap attempt and undertake strike action,<sup>1302</sup> and some would probably look to further their careers in other parts of the world, like China, where they would be able to achieve better rewards for their services. Any salary cap limit that the players were prepared to accept would be minor and have little, if any, effect on competitive balance.

It is equally doubtful that owners of the wealthy clubs would be willing to accept a salary cap limit. They might be prepared to accept a token limit, like Real Madrid and Barcelona have done in La Liga but in those cases no attempt at all was made to equalise the playing abilities of the clubs. The limitations were applied on a club by club basis looking at what each club could afford to spend on players, with the aim to protect the clubs' financial viability. It is probable that if any real attempt were made to utilise a salary cap to secure competitive balance, the wealthy clubs would consider setting up their own competition, as occurred with the G-14 group.

A final area of potential concern is the legality of the salary cap. This might not be an issue if consensus were to be obtained among the stakeholders, but consensus could be very difficult to achieve as a salary cap would be likely to have a considerable impact on players' income and greatly curtail spending by the wealthy clubs on player salaries. UEFA may contend that the economic benefits outweigh the negative aspects or that its introduction is for a legitimate, necessary and proportionate objective, but this would not be easy as the ECJ would probably

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<sup>1300</sup> Deloitte (n 1296) 19. Although Huddersfield had a lower revenue income than Cardiff's income of £125 million, it spent £64 million on wages compared to Cardiff's £54 million.

<sup>1301</sup> *Ibid.*

<sup>1302</sup> The salary cap has caused strike and lockout action in the MLB in 1994–95, in the NBA in 1995 and in the NHL in 2004–5. In the MLB, the owners were forced to use a luxury tax rather a salary cap due to player resistance.

view the salary cap as a major anti-competitive measure that would require significant justification. It is difficult to predict the ECJ's ruling as no cases involving salary caps have been decided because no legal challenge has ever been mounted. This is because there has always been a consensus approach and players in those sports where a salary cap has been utilised have been prepared to accept it. This may occur once again in the UEFA scenario but consensus for a salary cap would be harder to obtain because European football has not been used to any restraint measures. When the salary cap was introduced to the NFL in 1994, its player draft had been in existence since 1935,<sup>1303</sup> and the VFL, the forerunner to the AFL, had utilised a maximum wage before introducing a salary cap in 1986.<sup>1304</sup> These competitions had become used to player restrictions before the salary cap was introduced which would not be the case with UEFA and European football. In the circumstances, it is unlikely that the ECJ would support the introduction of a salary cap to European football.

#### 9.4.2.3 Revenue Sharing

Revenue sharing does present the possibility of producing a more even competition but its success would depend on how it is implemented. If revenue sharing simply amounts to sharing a revenue item like broadcasting income between the clubs equally, that would not necessarily produce an equalisation of clubs' revenues. However, if the distribution was calculated to give the poorer clubs a greater share of the revenue then it is possible that some competitive balance could be achieved. Further, the greater the number of revenue items that form part of the revenue sharing exercise, the more likely it is that it would lead to a more evenly balanced competition. The most evenly balanced outcome would result if all revenue income from each club in the competition was added together and this sum was divided equally between all the clubs. In this situation, each club would have the same amount to spend and this should produce a much more competitively balanced competition. Logically, the concept is sound with Advocate-General Lenz in *Bosman*<sup>1305</sup> noting its potential as an alternative to transfer fees and Wilkie J in *Smith*<sup>1306</sup> suggesting its use as 'the least restrictive alternative' to the draft system.

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<sup>1303</sup> Jay Berwanger, '1936 – The NFL's First Draft', *Pro Football Hall of Fame* (Web Page, viewed 20 May 2019) <<https://www.profootballhof.com/timeline/1930/1936-the-nfl-s-first-draft/>>.

<sup>1304</sup> Matt Murnane, 'What zoning in the AFL used to look like', *The Age* (online at 28 October 2015) <<https://www.theage.com.au/sport/afl/what-zoning-in-the-afl-used-to-look-like-20151028-gkxhod.html>>.

<sup>1305</sup> *Bosman* (n 81) para 226.

<sup>1306</sup> *Smith* (n 83) para 30.

Some commentators have considered revenue sharing as a possible alternative to the FFP Regulations. Lindholm states that its use would mean that ‘poor teams would not need to enter into debt to be able to compete with the richer teams’.<sup>1307</sup> He adds that ‘revenue sharing would mean that the rich teams would have less incentive to invest in players which would lead to less money being spent on salaries and greater profits for the clubs’.<sup>1308</sup> Kaplan also considers revenue sharing as a possibility, looking particularly at the areas of broadcasting and ticket sales. She suggests that, if broadcasting and ticket sales revenue was split equally between all the teams, that ‘there would be ‘greater competitive balance and less incentive to go into debt to reach European football’ and that it would ‘promote the long-term viability of European club football’.<sup>1309</sup>

However, notwithstanding the views of Lindholm and Kaplan, the introduction of a revenue sharing arrangement would face similar difficulties as the introduction of a salary cap. Within the various national leagues there exists a large differential in club revenues, which makes the prospect of a successful application of a revenue sharing scheme hard to imagine. In the EPL, for instance, the average revenue of the 20 clubs was £258 million in 2018–19.<sup>1310</sup> The top six teams averaged £500 million, which was £242 million above the league average.<sup>1311</sup> Manchester United’s revenue of £627 million was £369 million more than the average.<sup>1312</sup> In the circumstances, the ability to extricate the necessary funds from the top six clubs to provide a situation of an even distribution of income across all clubs in the EPL would almost certainly be unachievable. Any attempt to compromise on a figure would be pointless because any such amount would be too insignificant to cause a noticeable difference to the unevenness of the competition. Furthermore, the income differentials in the EPL are not an exceptional case as the differences are similar in the La Liga<sup>1313</sup> and in the Bundesliga.<sup>1314</sup>

The stakeholders that would be most affected by any revenue sharing scheme are the club owners, and, most obviously, the owners of the wealthy clubs who would have to make the revenue sharing payments. They would undoubtedly resist making such payments, which is a

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<sup>1307</sup> Lindholm (n 167) 210.

<sup>1308</sup> *Ibid.*

<sup>1309</sup> Kaplan (n 763) 855.

<sup>1310</sup> Deloitte (n 1296) 19.

<sup>1311</sup> *Ibid.*

<sup>1312</sup> *Ibid.*

<sup>1313</sup> Kunti (n 1298) 1.

<sup>1314</sup> Koptyug (n 1297) 1.

view supported by Lindholm<sup>1315</sup> and Kaplan,<sup>1316</sup> at least to some extent. Some of the large clubs are publicly owned companies and have responsibilities to their shareholders. Manchester United, for example, also has large interest payments to make as its owners borrowed a considerable amount of money to purchase the club.<sup>1317</sup> Further, the wealthy clubs are likely to argue that large crowd attendances reflect the support which their clubs have built and gained over the years and that they should be entitled to all of their gate receipts. Similarly with broadcasting rights, the larger clubs would argue that it is their teams which the viewers want to see and that, therefore, they should receive a bigger share of the revenue.<sup>1318</sup> One of the main concerns from the perspective of the wealthy club owners would be the size of the revenue sharing payment that would need to be made to equalise the incomes of the various clubs in their national league to influence the competitive balance of the competition. The wealthy clubs would also lose their competitive advantage and this might encourage them to consider forming their own alternative competition.

Players may not necessarily be immediately concerned by a revenue sharing scheme as they may consider it to be an issue that would not affect them as directly as a salary cap would. This, however, would not be the case, particularly if a real effort was made to equalise revenue. It would mean every club would have approximately the same amount to spend on players which would lead to a situation similar to that which might apply to a salary cap, where the wealthy clubs could no longer pay the high wages of the best players. With limited funds available, a more careful deployment of individual salaries would be required to ensure the provision of a competitive squad. Such an eventuality would probably draw resistance from the players, particularly the top ones, and could lead to Europe losing some of its better players to other less restricted competitions.

From a legal perspective, one might expect that a revenue sharing measure would receive court approval, bearing in mind some judges have referred to it as a possible way to achieve competitive balance. However, a court may not be supportive of a measure that did not have the support of all the club owners, particularly if the revenue sharing payment was a

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<sup>1315</sup> Lindholm (n 167) 210.

<sup>1316</sup> Kaplan (n 763) 855.

<sup>1317</sup> Paul Hirst, 'Glazer family have drained £1 billion from Manchester United and cost club chance of dominating Europe', *The Independent* (online at 12 May 2015) <<https://www.independent.co.uk/sport/football/premier-league/glazer-family-have-drained-ps1-billion-manchester-united-10244576.html>>.

<sup>1318</sup> 'How much money each Premier League club earned from TV and their final position', *Talksport* (Web Page, 18 May 2018) <<https://talksport.com/football/376346/how-much-money-each-premier-league-club-earned-tv-and-their-final-position-180518283150/>>. In EPL, broadcasting payments for the 2017–18 season provided Manchester United with £149,767,145 whilst West Bromwich Albion received £94,666,492.

considerable amount. There is also a chance that some players, too, could oppose the measure if their salaries were affected by its introduction. It would be a difficult decision for the ECJ to make, particularly if there is a real attempt to equalise the revenue of the clubs as this will require major transfers of money. The ECJ may uphold a revenue sharing scheme if the sums being transferred were reasonable but the amounts required to orchestrate an even distribution of revenue would be considerable, making it most unlikely that the ECJ would approve such a scheme in relation to European football.

Revenue sharing does present some potential for competitive balance, but its exclusive focus on the revenue side of the ledger to the exclusion of expenditure means that it cannot provide the same financial stability as the FFP Regulations. As a consequence, it cannot be considered as a viable alternative to them even though, as mentioned above, it has received court approval in the form of *obiter* statements made in *Bosman* and in *Smith*.

#### 9.4.2.4 *Luxury Tax*

A luxury tax on wages is a ‘soft’ salary cap where clubs are able to exceed a threshold for the total wages paid to their players on the basis that they pay a tax on any excess sum spent. Some commentators suggest that the luxury tax could be an alternative to the FFP Regulations. For instance, Dupont suggests that a luxury tax could be utilised and supplemented with a requirement that clubs wanting to overspend should be required to guarantee the money they want to spend by putting it in the bank in the June before the season starts.<sup>1319</sup> Kaplan states that ‘UEFA could...combat excess spending by implementing a luxury tax’.<sup>1320</sup> Lindholm sees the luxury tax as having the advantage of being ‘more relaxed’ than the salary cap but states that this advantage is ‘offset by a decreased ability to achieve the underlying aims’.<sup>1321</sup> Jemson considers the luxury tax to be a ‘less restrictive measure’ than the FFP Regulations but that it does not ‘adequately achieve UEFA’s objective’, because the tax does not eliminate ‘risky financial practices’ but simply makes them ‘more expensive’.<sup>1322</sup>

Lindholm’s and Jemson’s assessments appear valid, acknowledging UEFA’s original objective of financial stability with an appreciation that the luxury tax does not really achieve

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<sup>1319</sup> Jean-Louis Dupont, ‘Football’s Anticompetitive Streak’, *The Wall Street Journal* (online at 25 March 2013) <<https://www.wsj.com/articles/SB10001424127887324077704578357992271428024>>.

<sup>1320</sup> Kaplan (n 763) 854.

<sup>1321</sup> Lindholm (n 167) 211.

<sup>1322</sup> Jemson (n 766) 33.

it. Dupont's suggestion of a guarantee does provide an element of financial stability in the area of player wages, but this is only one area of a club's business and could be equally covered by a voluntary agreement between UEFA and the club wanting to overspend. Kaplan's view also has merit, although as the MLB and NBA have shown, some clubs are not necessarily going to stop spending on players despite the luxury tax.

The implementation of a luxury tax within European football would also have practical difficulties as UEFA would not be able to introduce a uniform luxury tax across all the national leagues of its 55 member countries. The wealth differential between the national leagues would make this impossible. The tax would, therefore, need to be introduced by establishing a threshold point for each individual league. For the tax to be effective, the threshold point would need to be correctly positioned and the level of penalties reasonably established. This would be difficult to achieve when there is such a major disparity in the financial standing of the clubs. These are the issues that the MLB and the NBA have had to face but UEFA's problem is even more pronounced due to the large differentials between some of the clubs in the European national leagues. In 2019, for instance in La Liga, Barcelona was allotted the sum of €632.97 million to spend on wages, while Valladolid was allowed to spend only €23.88 million.<sup>1323</sup> Barcelona's spending power was between 26 and 27 times more than Valladolid's, with Barcelona player Lionel Messi's salary alone being greater than that of Valladolid's whole playing and coaching staff.<sup>1324</sup>

As far as stakeholder interest is concerned, it is probable that most resistance will come from wealthy club owners who would not willingly forfeit their current financial advantage by having to pay a tax for the privilege of paying high wages to their own players. The strength of their reaction would likely depend on the threshold set and the size of the penalties for breaching it. Should the tax be punitive, and it would have to be if it was going to have any impact on the evenness of competition, then the wealthy clubs would be likely to look at alternative options including forming their own competition.

Players are likely to find a luxury tax more acceptable than a salary cap. This was certainly the case in the MLB, where the owners had to settle for a luxury tax rather than a salary cap

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<sup>1323</sup> Mark Sochon, 'La Liga's salary gap', *Laliga Expert* (Blog Post, 4 March 2019) <<https://laligaexpert.com/2019/03/04/la-liga-salaries/>>.

<sup>1324</sup> *Ibid.*

due to player pressure.<sup>1325</sup> In the MBL and NBA, where the tax has been used, the wealthy clubs have been prepared to pay the tax so there has been no real threat to players' wages. However, given the large disparity between the financial positions of the clubs in some of the national leagues, this may not be the case in European football. With the potential liability for a large luxury tax, the wealthier clubs may consider it appropriate to reduce their salaries allocation which will reduce the amount of money available to be paid to players.

From a legal perspective, it is likely that the ECJ would not consider the luxury tax as an alternative to the FFP Regulations. There are two reasons. First, the FFP Regulations were introduced to bring financial stability to European football and this will not necessarily be achieved with a luxury tax. A luxury tax may improve competitive balance within European football, but it will not impose any definite restraints on club spending. It will only curb spending if a club decides to abide by the threshold limit, but clubs would not be required to do that. A club might decide to exceed the threshold and become liable for a luxury tax payment. In this latter instance, the club's spending would actually increase further, as it would be liable for the additional cost of the tax on top of the wages. The luxury tax, therefore, would not provide financial viability in the clear robust manner that the FFP Regulations do with the breakeven principle. The ECJ would probably acknowledge this key difference and accept that the FFP Regulations are more appropriate than a luxury tax.

Secondly, although a luxury tax would provide an element of choice, in that clubs can either choose to spend below the threshold or go beyond it and pay the tax, it still has the potential to be a major restriction on competitive practice, particularly when the impacts on some of the parties could be severe as would be the case in European football. In the circumstances, the luxury tax does not seem to provide a reasonable alternative to the FFP Regulations.

#### *9.4.2.5 Ban on Cash Transfers*

A ban on cash transfers would prevent financial payment being made for players. This would mean a player would need to complete his or her contract with their current club unless the club was prepared to release him or her, or an exchange of players with another club could be arranged, involving no monetary consideration. The large expenditure by some clubs on the purchase of players has prompted suggestions that a ban on cash transfers might be a viable

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<sup>1325</sup> Dayn Perry, 'No, baseball (still) doesn't need a salary cap', *CBS Sports* (Web Page, 5 December 2013) <<https://www.cbssports.com/mlb/news/no-baseball-still-doesnt-need-a-salary-cap/>>.



alternative means of securing financial stability than the FFP Regulations.<sup>1326</sup> A record \$4.79 billion was spent on 14,591 international transfers in 2016, with an average of \$328,000 per transaction.<sup>1327</sup> Lindholm suggests that a ban on cash transfers may be a possible alternative to the FFP Regulations and maintains that banning the practice would reduce club debt. It would also not breach Article 45 of *TFEU* by interfering with the free movement of workers.<sup>1328</sup> He notes that cash-free trades occur in North America and Australia.<sup>1329</sup> Kaplan suggests that a cap on transfer fees or ‘a ceiling on the amount of income...spent on wages’ may be appropriate.<sup>1330</sup> She states that ‘[a] cap on transfer fees or a wage ceiling, along with regulatory body oversight on club debt levels may be sufficient to introduce more discipline and rationality without the overly restrictive constraints of FFP.’<sup>1331</sup> Similarly, Szymanski maintains that ‘[a]s it currently operates the transfer system sustains the dominance of the elite clubs by ensuring that they are the only ones with the financial muscle to afford the transfer fees payable for the very best players.’<sup>1332</sup>

The commentators’ concerns in regard to transfer fees are justified. The current transfer market clearly encourages the status quo between the wealthy and the poorer clubs. However, from a financial viability perspective, the FFP Regulations are a comprehensive tool which ensures that clubs do not overspend. A restraint on transfer fees would not prevent a club from overspending in another area and, for this reason, it would not be as effective for procuring financial stability as the FFP Regulations. Further, where a club does overcommit itself in the transfer market and cannot pay its debts, as discussed in Chapter 5.4, it will be in breach of the payables overdue rule under the FFP Regulations and would be punished for its transgression.

Banning cash transfers would, therefore, not resolve the issues of financial stability, it would simply deflect the problem. Rather than pay transfer fees, the large clubs would still obtain the better players by agreeing to pay them larger salaries. This view is supported by Bret who

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<sup>1326</sup> Lindholm (n 167) 210 and Kaplan (n 763) 854.

<sup>1327</sup> Miriam Quick, ‘Every summer, enormous amounts of money change hands as top football clubs vie for the best players. Here’s a rundown of how it all works’, *BBC* (Web Page, 29 August 2017) <<https://www.bbc.com/worklife/article/20170829-how-does-a-football-transfer-work>>.

<sup>1328</sup> *Ibid.*

<sup>1329</sup> *Ibid.* These are often linked with player draft systems which are used in the US and Australia but are not, as a rule, used in Europe.

<sup>1330</sup> Kaplan (n 763) 854.

<sup>1331</sup> *Ibid.*

<sup>1332</sup> Stefan Szymanski, ‘The economic arguments supporting a competition law challenge to the transfer system’, *SlideShare* (Slide Show, July 2015) <[https://www.slideshare.net/Monty\\_FIFPro/stefan-szymanski-study-abusive-transfer-system-is-failing](https://www.slideshare.net/Monty_FIFPro/stefan-szymanski-study-abusive-transfer-system-is-failing)>.

states ‘[i]mportant differentiators for clubs may no longer be what they can outlay in transfer fees but what they can afford to pay in salaries’.<sup>1333</sup> Odogwu puts the likely occurrence in a slightly different way, saying that ‘[i]nstead of the obligation to buy out contracts from poorer clubs at an additional premium on purchase price...the richest would instead attract players by offering them larger pay packets’.<sup>1334</sup> However, he also accepts that simply banning transfers does not provide a workable solution.

#### *9.4.2.6 Regulations used by the German and French Football Associations*

With a ban on cash transfers not providing a suitable alternative to the FFP Regulations it is necessary to consider other possibilities including the regulations used by the German and French national associations. Kaplan maintains that the financial regulations used by the German Football Association (DFL) in respect of German clubs may be a better, less restrictive way to proceed.<sup>1335</sup> German football has certainly not recently been affected by clubs getting into financial difficulties<sup>1336</sup> and the DFL carefully monitors clubs’ debt levels to reduce the risk of insolvency.<sup>1337</sup> It also has the power to veto a transfer if it looks unaffordable for the club involved.<sup>1338</sup>

In the German league (Bundesliga) there are three pillars to the financial regulation: the licensing system, the safeguard fund, and the ownership rules.<sup>1339</sup> The licensing system requires each club to submit financial data to the DFL for the previous and current years, as well as a forecast for the upcoming season.<sup>1340</sup> This data needs to be certificated and checked by an auditing firm with the DFL granted comprehensive information disclosure rights.<sup>1341</sup> Conditions for approval are a forecast positive liquidity situation as well as a positive net equity at the end of the upcoming season, together with a positive net equity in the last regular

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<sup>1333</sup> Angélique Bret, ‘Analysis of the legal arguments in FIFPro’s challenge to FIFA’s football transfer system’, (10 March 2016) LawInSport <<https://www.lawinsport.com/topics/item/analysis-of-the-legal-arguments-in-fifpro-s-challenge-to-fifa-s-football-transfer-system>>.

<sup>1334</sup> Ifeanyi Odogwu, ‘Player Contracts: Football transfers v European Union law: analysis’, *Garden Court Chambers Blog* (Blog Post, 13 May 2014) <<https://gclaw.wordpress.com/2014/05/13/player-contracts-football-transfers-v-european-union-law-analysis/>>.

<sup>1335</sup> Kaplan (n 763) 850–852.

<sup>1336</sup> Borussia Dortmund was on the brink of bankruptcy and in 2004 received a loan from Bayern Munich of €2 million to pay players.

<sup>1337</sup> Kaplan (n 763) 850–852.

<sup>1338</sup> *Ibid.*

<sup>1339</sup> Oliver Budzinski, ‘Football and Regulation: Why German Teams Might Win in the End’, *Play the Game* (Web Page, 2 April 2018) 5 <[https://www.playthegame.org/fileadmin/image/knowledgebank/Challengesforfootball\\_pdf/Oliver\\_Budzinski.pdf](https://www.playthegame.org/fileadmin/image/knowledgebank/Challengesforfootball_pdf/Oliver_Budzinski.pdf)>.

<sup>1340</sup> *Ibid.* 6.

<sup>1341</sup> *Ibid.*

balance sheet.<sup>1342</sup> The safeguard fund provides a ‘bridging temporary liquidity crisis of clubs in order to safeguard match and league operations’ with a maximum payment of two months of salaries or €5 million.<sup>1343</sup> The penalty for a club utilising the fund is a three point deduction.<sup>1344</sup>

One aspect unique to the Bundesliga is the ownership rule which requires the football club (the club’s members) to hold a controlling majority (50% plus 1).<sup>1345</sup> There are two exceptions to this rule, Wolfsburg (owned by Volkswagen) and Bayer Leverkusen (owned by chemical company Bayer).<sup>1346</sup> These exceptions are allowed because the clubs were established in the Bundesliga before the rule was introduced.<sup>1347</sup> The ownership rule discourages foreign investment, with most investors obviously wanting a controlling interest in any club in which they invest. The rule, although dissimilar to the investor restriction which applied to the FFP Regulations until 2015, has much the same effect.

Due to the nature of the Bundesliga financial regulations, it is understandable why German clubs have not experienced any difficulties in complying with the FFP Regulations. The German regulations are similar to the FFP Regulations with a balanced book provision equating to the breakeven requirement and a careful monitoring of debts comparable to the payables overdue provision. Both schemes have some restrictions on investment, although they arose for different reasons, with the ownership rule applying in Germany and the FFP Regulations providing some limitations in Europe overall. A slight difference does arise with a strict valuation applying to sponsorship deals with the FFP Regulations, whereas no valuation applies to German sponsorship arrangements. The arrangement in Europe (the FFP Regulations) was of particular importance when there was an absolute prohibition on equity investment, with the valuation being required to prevent clubs enhancing sponsorship payments to obtain equity investment through this guise.

It is difficult to distinguish between the merits of the FFP Regulations and the German system. The ownership rule is peculiar to German football and it would not be appropriate or practical to introduce it into European football where foreign ownership is already firmly established. It is also important that, where a strict breakeven rule is being utilised, it should be supported

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<sup>1342</sup> Ibid.

<sup>1343</sup> Ibid 9.

<sup>1344</sup> Ibid.

<sup>1345</sup> Ibid 10.

<sup>1346</sup> Ibid.

<sup>1347</sup> Ibid

by accurate valuations of sponsorship agreements; otherwise there is the opportunity for clubs to circumvent the purpose and intent behind the rule. These two differences make the FFP Regulations a more suitable model for UEFA and, in any event, with the two systems being comparable in both nature and intent, it is likely there would be no practical benefit in exchanging one system for the other.

The financial regulations used by the Direction Nationale du Contrôle de Gestion (DNCG) in France to oversee French football clubs seem to be less restrictive and more proportionate than the FFP Regulations.<sup>1348</sup> The 2013 example of Paris St Germain (PSG) tends to support the point in that it was sanctioned by UEFA and not by the DNCG. UEFA's sanction arose due to its fair value requirement for sponsorship arrangements. PSG had an agreement with the Qatar Tourism Authority for €200 million but UEFA valued the transaction at only €100 million,<sup>1349</sup> thus deducting €100 million from its income and providing it with potentially less money to spend to meet the breakeven requirement.

The DNCG was formed in 1990 with the objective: 'to control the solvency of professional clubs so as to avoid within-season insolvencies that threaten[ed] the integrity of the competition'.<sup>1350</sup> The objective provides for the DNCG to:

[C]heck that clubs have the financial means (cash, shareholders' equity) to complete the competitions in which they are registered, [but] does not prevent us [the DNCG] from looking to ensure operating profits and cash in the medium term; and in particular to ensure that contractual commitments (e.g. player contracts) are covered by future income streams which are considered reasonably secure.<sup>1351</sup>

To monitor this, the DNCG needs 'clubs registered in competitions [to] have the required shareholder funding in place to carry out their activity and fulfil their obligations without risk of a potential period of crisis'.<sup>1352</sup> Although the DNCG has the power 'to levy appropriate sanctions on clubs that do not protect the financial sustainability of their club',<sup>1353</sup> the most usual penalty is to formulate a budget for hiring or to impose limits on the payroll of clubs,

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<sup>1348</sup> Kaplan (n 763) 852.

<sup>1349</sup> Nadine Dermitt-Richard, Nicolas Scelles and Stephen Morrow, 'French DNCG management control versus UEFA Financial Fair Play: a divergent conception of financial regulation objectives' (2017) *Soccer and Society* 408, 409 <<https://www.tandfonline.com/doi/abs/10.1080/14660970.2017.1323740>>.

<sup>1350</sup> Ibid 411.

<sup>1351</sup> Ibid.

<sup>1352</sup> Ibid.

<sup>1353</sup> Andrew Wenger, 'UEFA Financial Fair Play', *Soccer Politics* (Web Page, 27 December 2012) <<https://sites.duke.edu/wcwp/2012/12/27/uefa-financial-fair-play/>>.

with the educational purpose of helping the clubs remain financially viable.<sup>1354</sup> Kaplan states that ‘DNCG is a regulatory body whose intention is not to audit the financials of each club, but to oversee how much each club owes to debtors, the club’s provisional accounts for the next season, and an operating forecast for the next three seasons’.<sup>1355</sup>

French clubs have been under the jurisdiction and control of the DNCG for more than twenty years.<sup>1356</sup> However, despite this, five First Division clubs have become insolvent in that period with the last being Valenciennes in 2013–14.<sup>1357</sup> Scelles et al found, as had Andreff earlier,<sup>1358</sup> that the DNCG has had no impact on reducing insolvency in French football.<sup>1359</sup> A comparison with England, where, no regulation was in place until the FFP Regulations, reveals a similar ‘frequency of insolvencies per club-year: 3% in France compared to 2% in England’.<sup>1360</sup> Further, there have been no French First Division insolvencies since the introduction of the FFP Regulations, which tends to suggest that they may be more robust. Thus, the DNCG objectives and processes do not seem as vigorous or as exacting as the FFP Regulations and accordingly do not appear to have been as successful in their operation. In the circumstances, the financial regulations of the DNCG do not provide a viable alternative to the FFP Regulations.

#### 9.4.2.7 Solvency Test

Another possible alternative to the FFP Regulations, which Jemson suggests, is the solvency test used under the *Companies Act 1993* (NZ) which applies to individual NZ sporting clubs because they are all incorporated.<sup>1361</sup> This is a two part test requiring a company to be able to pay its debts as they become due and to have the value of its assets greater than the value of its liabilities for it to prove that it is a solvent entity.<sup>1362</sup> The main reason for suggesting this particular test was its ability to take into account equity contributions which, at the time it was

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<sup>1354</sup> Karl Lusbec, ‘The UEFA Financial Fair Play; An Inspiration from the French DNCG?’, (Blog Post, 2 February 2011) <<https://karllusbec.wordpress.com/2011/02/02/the-uefa-financial-fair-play-a-inspiration-from-the-french-dncc/>>.

<sup>1355</sup> Kaplan (n 763) 853.

<sup>1356</sup> Frederic Thiriez, ‘Thiriez: Financial Fair Play is key’, *Ligue1* (Web Page, 12 December 2012) <[www.ligue1.com](http://www.ligue1.com)>.

<sup>1357</sup> Nicola Scelles, Stefan Szymanski, Nadine Dermit-Richard, ‘Insolvency in French Soccer: The Case of Payment Failure (2016) *Journal of Sports Economics* 11.

<sup>1358</sup> Wladimir Andreff, ‘French Football: A financial crisis rooted in weak governance’ (2007) 8(6) *Journal of Sports Economics* 652–661.

<sup>1359</sup> Scelles, Szymanski, Dermit-Richard (n 1357) 18.

<sup>1360</sup> *Ibid* 19.

<sup>1361</sup> Jemson (n 766) 34. There is a similar requirement under the *Corporations Act 2001* (Cth) in Australia.

<sup>1362</sup> *Ibid*.

proposed, were not allowed by the FFP Regulations.<sup>1363</sup> The introduction of the voluntary agreement provision in 2015 has reduced the restriction on equity contributions so, to some extent, the issue it sought to overcome is now not as relevant as before.

The solvency test is comparable to the FFP Regulations in that the first part of the test requires satisfactory evidence that a company/club can pay its debts. This is covered by Articles 49 and 50 of the FFP Regulations which deal with ‘overdue payables’. The second limb looks at a company/club’s financial position through its assets and liabilities, its balance sheet rather than through its revenue and expenses, its profit or loss. Both the balance sheet and the profit and loss statements are important financial documents which provide useful information about the company/club. The former reveals the company/club’s financial position at a given date, whereas the latter reveals the flow of money through the company/club. However, the profit and loss statement, upon which the breakeven requirement is based, appears to be a better method to assess a company/club from a financial stability perspective. It is more up-to-date and reflective of the company/club’s ability to pay its debts immediately and to maintain sufficient cash flow to operate in a solvent manner.

Jemson acknowledges there would be legitimate concerns as to whether equity participants honour their agreed investment obligations, but states that this could be covered by a bank guarantee.<sup>1364</sup> The guarantee provision was considered in Chapter 9.4.2.4 where it was determined that it would be in the interests of financial stability for any such arrangement to be monitored under a voluntary agreement arrangement. In finalising his view on the solvency test, Jemson states that, since it is only a little less restrictive than the FFP Regulations, he ‘finds it unlikely that a court would declare FFP disproportionate, based on an alternative that offered only a minor reduction in competitive restrictions’.<sup>1365</sup> However, Jemson’s conclusion was written before the introduction of the voluntary agreement. The current FFP Regulations appear to be a better measure for judging a club’s financial stability than the solvency test and are likely to be viewed by the ECJ as a more effective and efficient means of delivering that objective.

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<sup>1363</sup> Ibid.

<sup>1364</sup> Ibid 35.

<sup>1365</sup> Ibid 36.

#### *9.4.2.8 Banking Industry Regulations*

The regulations that the banking industry uses could be a possible alternative to the FFP Regulations, especially as banks also seek financial stability.<sup>1366</sup> There is a similar interconnectedness between banks as there is with football clubs in that, if one suffers financial collapse it can affect its rivals.<sup>1367</sup> However, as Jemson asserts, the banking sector's financial arrangements are different to those of clubs.<sup>1368</sup> Banks effectively act as intermediaries, borrowing money from investors and lending it to third parties, and they may experience difficulties if their borrowers are unable to repay their loans as this could mean that the banks are unable to repay their investors. Banks, therefore, require a level of capital to meet their obligations, otherwise they are exposed to debtor default. Clubs, however, have a different issue to address, which is not having sufficient revenue to meet their expenses and Jemson concludes that '[a]s such a measure would not reduce the risk of financial collapse in the football industry, it could not be considered a valid alternative to the FFP Regulations'.<sup>1369</sup>

Notwithstanding this, the concept behind the banking regulation of basically requiring a reserve capital sum available to meet expenses that may arise seems to be a reasonable answer to the financial stability issue as there would be a sum in reserve to meet shortfalls. However, this would place extra restrictions on the clubs because it is most unlikely that the majority of clubs would have the money available to finance a reserve fund. It may also be difficult to assess how much should be in the reserve fund. This type of arrangement may be acceptable to those clubs which can supply a reserve fund with the assistance of equity participants. However, funding of this type would be most appropriately conducted under a voluntary agreement to ensure a clear and complete financial path for the club to adopt that is controlled and monitored by UEFA. This would provide a better opportunity for financial stability.

#### *9.4.2.9 Overinvestment Controls*

Overinvestment occurs when a business invests too much capital in a project(s). This term could be used to describe what has happened in European football with some clubs overinvesting to produce a winning team. Jemson considers a different way to deal with the

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<sup>1366</sup> Ibid 36.

<sup>1367</sup> Ibid.

<sup>1368</sup> Ibid 37.

<sup>1369</sup> Ibid.

problem of overinvestment, suggesting it may be more appropriate to change the behaviour of clubs towards this issue rather than introduce ways to control or restrict it.<sup>1370</sup>

With the aim to discourage overinvestment, Jemson reviewed UEFA's competitions to see what could be done to allow the 'luck' factor to play a bigger part in the results. He refers to UEFA's seeding system, the use of groups in its competitions and also the large amount of prize money offered and suggests that changes in these areas might reduce the likely success factor sufficiently to discourage clubs from overinvesting. Reducing competition prize money would provide the opportunity to increase solidarity payments. This issue is discussed in Chapter 10.4, but it is unlikely that it would deter clubs from seeking competition success. The utility maximising model is likely to apply with the sense of potential pride and achievement overriding profit considerations. The seeding system in UEFA competitions is probably also best left untouched. A competition with no seeds could lead to a more competitively balanced tournament in that strong teams might be drawn against each other in an early round, giving rise to the departure of a better side earlier in the competition. However, this may result in some one-sided matches later in the competition which may not generate public support and interest. Similarly, not having a group stage would also increase the chances of the poorer sides progressing, but the group stages ensure more games are played which helps increase overall competition revenue. The benefits to competitive balance by altering the seeding and group stage arrangements do not appear to be sufficient to risk the potential downside of loss of public interest and revenue. Jemson, himself, correctly states that although changes to the competition rules may lead to a decline in overinvestment, it is unlikely a court would look to substitute this type of change for the FFP Regulations.<sup>1371</sup> The reasons are twofold. First, there is a lack of firm evidence to show it would definitely work and secondly, it is most unlikely the ECJ would seek to judicially change the sporting rules of a competition, preferring to leave this to the expertise of the association with the practical knowledge of running its competitions.<sup>1372</sup>

In the circumstances, the method suggested for dealing with overinvestment does not provide a realistic alternative to the FFP Regulations. Further, even if a satisfactory method of discouraging overinvestment could be devised, there is no certainty that the clubs would accept it and reduce their investment accordingly. The safer approach is to have rules in place

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<sup>1370</sup> Ibid.

<sup>1371</sup> Ibid.

<sup>1372</sup> Ibid.



to prevent overinvestment, rather than rely on the more risky method of trying to find ways to discourage it.

#### *9.4.2.10 Variations to the FFP Regulations*

The key feature of the present FFP Regulations is the breakeven requirement. However, Bastianon, and Budzinski<sup>1373</sup> suggest that ‘the no overdue payable rule alone can represent the more correct answer’.<sup>1374</sup> In other words, they are saying there is no need for the breakeven provision and, if UEFA simply monitored each club’s debts, that would be sufficient to ensure each club’s financial viability. This would be less restrictive, but it is not sufficient to achieve financial stability. The idea appears to be analogous to the DNCG objective of concentrating on the clubs’ debts, as discussed earlier. However, monitoring of the whole financial picture is required for an effective outcome.

Bastianon and Budzinski also maintain that if the breakeven principle was to continue it could be made less restrictive by including equity-increasing injections as being ‘relevant income’ for the purposes of applying that principle.<sup>1375</sup> However, they expressed that view prior to the introduction of voluntary agreements to the FFP in 2015, so it is no longer as relevant as it was.

A further alternative to the FFP regulations advanced by Serby is ‘the requirement for equity investors to provide a bank guarantee’.<sup>1376</sup> This type of approach was discussed in Chapter 9.4.2.4 when considering Dupont’s suggestion that a luxury tax could be utilised with a bank guarantee to assure that any overspending was covered.<sup>1377</sup> This is basically what UEFA requires under its voluntary agreement provision and UEFA’s process appears to be the most appropriate way to proceed as it includes a careful examination of the investor’s business plan and ongoing monitoring of that plan. UEFA’s regular checking of the situation is more likely to lead to financial stability, and its link with the breakeven requirement (the investor is required to meet this requirement once the agreement expires) adds to the likelihood of success.

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<sup>1373</sup> Oliver Budzinski, ‘The Competition Economics of Financial Fair Play’ (Economic Discussion paper Vol 19 No 85. Institute of Economics Ilmenau University of Technology, March 2014) 16.

<sup>1374</sup> Bastianon (n 608) 35.

<sup>1375</sup> Ibid. See also Budzinski (n 1373) 16.

<sup>1376</sup> Serby (n 813) 51.

<sup>1377</sup> Dupont (n 1319) 1.

Serby also canvasses the ‘so-called ‘Football Creditors rule system’ used in the UK as ‘a means capable of curing the potential for insolvency brought about by overinvestment in professional football clubs’.<sup>1378</sup> This rule provides protection to ‘football creditors’ requiring that their debts be paid by the debtor club before the EFL will allow them to rejoin their competition.<sup>1379</sup> This particular rule, whilst it might prevent a domino effect ‘of other clubs not getting paid and having to enter administration themselves’,<sup>1380</sup> is not really a viable alternative to the FFP Regulations which are focused on trying to prevent insolvency in the first place, rather than preventing its escalation to other clubs after it has occurred to one club.

### 9.5 Conclusion

The two main exemptions to Article 101(1) are likely to apply in the case of the FFP Regulations. Article 101(3) would probably be approved by the ECJ because the FFP Regulations provide the economic benefit of financial stability to European football with minimal effect on competition. Similarly, the ancillary restraint exemption appears to also apply to the FFP Regulations in that they are legitimate and necessary to provide financial stability as well as proportionate in that there is no better or less restrictive measure available to achieve that aim.

The other alternatives may provide greater competitive balance, but financial stability was the reason for introducing the FFP Regulations. They also produce problems in regard to implementation with the disparity in wealth between the clubs making it difficult for them to be effective. In addition, the financial measures required to bring the wealthy clubs in line with the poorer ones would need to be extensive and it would be unlikely that some stakeholders, particularly the wealthy clubs, would be willing to accept them. It is also unlikely the ECJ would be prepared to approve them, due to the considerable financial impact on some clubs that would be required to make them workable.

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<sup>1378</sup> Serby (n 813) 52.

<sup>1379</sup> Jeremy Whitson, ‘Football Creditor Rule. Is the Football League’s new insolvency policy a step in the right direction?’ (12 July 2016) *LawInSport* <[www.lawinsport.com](http://www.lawinsport.com)>. ‘In 2015 an additional requirement was imposed that other creditors must receive at least 25 pence in the pound (or 35 pence in the pound if paid over 3 years). A failure to meet this obligation could result in a further 15 point deduction for the club.’

<sup>1380</sup> Jonathan Munnery, ‘The Football Creditors Rule – What is it and what does it mean for all creditors?’, *Real Business Rescue* (Web Page, 15 September 2015) <[www.realbusinessrescue.co.uk](http://www.realbusinessrescue.co.uk)>.

## CHAPTER 10: THE IMPORTANCE OF COMPETITIVE BALANCE AND UEFA'S OPTIONS

### 10.1 Introduction

The FFP Regulations appear to comply with ECL but how UEFA might handle the competitive balance issue, particularly in relation to some of the national leagues in European football, is examined in this chapter. This chapter will answer the fourth thesis question: What measures can UEFA implement to increase competitive balance within European football? The better European clubs tend to perform well regularly in their respective national leagues and this qualifies them for entry into UEFA's competitions which yield good prize money, especially for those that manage to reach the latter rounds. As previously discussed, this provides those clubs with funds that enable them to improve their playing squads at the expense of the weaker teams in their national league which, in turn, allows them to extend their superiority and their success. They can also use their ongoing success to increase revenue from other resources, such as broadcasting, ticket and merchandise sales and sponsorship agreements. This chapter will review the issue of competitive balance and then examine how UEFA can best resolve the matter or whether UEFA needs to be concerned about it.

### 10.2 UEFA's Assessment of the Competitive Balance Situation

UEFA's own thoughts on the topic of competitive balance are revealing. UEFA's president, Aleksander Ceferin stated, when addressing the ECA:

Let's put our cards on the table and be honest with ourselves: the biggest challenge over the next few years will be competitive balance. How can we continue to develop football in Europe and avoid widening the huge gulf between the most powerful and the rest? That is the million dollar question.<sup>1381</sup>

Ceferin has also indicated that UEFA might be prepared to introduce a salary cap, stating UEFA 'must be prepared to tackle the decrease in competitive balance within European club competitions and secondary effects affecting domestic competitions'.<sup>1382</sup> He went on to say that '[i]n future, we will have to take into serious consideration the possibility of limiting

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<sup>1381</sup> 'Ceferin puts competitive balance top of UEFA agenda', *Inside World Football* (Web Page, 5 September 2017) <<http://www.insideworldfootball.com/2017/09/05/ceferin-puts-competitive-balance-top-uefa-agenda/>>.

<sup>1382</sup> 'Ceferin: UEFA need salary cap', *Football Italia* (Web Page, 1 July 2017) <<https://www.football-italia.net/105077/ceferin-uefa-need-salary-cap>>.

clubs' budgets for players' wages' and that 'the wealthiest clubs are only getting richer and the gap between them and the rest is getting bigger'.<sup>1383</sup> Ceferin did acknowledge, at the same time, that any such plans would meet with resistance and stated that '[i]f we succeed, it will, in my opinion, be a historic change'.<sup>1384</sup> There has been some suggestion that Ceferin's remarks were more of a political comment than a policy statement and that he was trying to gain favour with some of the smaller leagues in the smaller countries by showing he was aware of the financial imbalance within European football.<sup>1385</sup> Furthermore, Ceferin was subsequently reported as saying that 'conventional salary caps seem quite impossible'.<sup>1386</sup>

Ceferin has also discussed other forms of restraint that could be examined, including 'luxury taxes, squad limitations and fair transfer rules to avoid player hoarding and the excessive concentration of talent within a few teams'.<sup>1387</sup> He continued to say '[w]e cannot allow the greatness of some to overshadow and drown the rest. If we allow gaps to become too great we will be neglecting those who have little opportunities. We face a threat that the bottom becomes unstable because the rest of the world is focused on the top.'<sup>1388</sup> In a later comment, Ceferin stated that 'the idea of luxury taxes are being debated, but they remain a challenge'.<sup>1389</sup> It is, of course, difficult to ascertain with certainty Ceferin's motives, but he has raised the need for change on more than one occasion, although it does seem he is unsure as to what form that change should take. This is unsurprising as the issue is a delicate one and the views of a number of different, but important, stakeholders have to be acknowledged and considered.

If there was a straightforward answer UEFA would have adopted it. The main difficulty is that the normal measures, such as salary cap, revenue sharing and the draft system, that are used elsewhere to achieve competitive balance are not feasible in the European football setting. There are three reasons for this: the large differential in both income and wealth between the

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<sup>1383</sup> Paul MacInnes, 'UEFA's Aleksander Ceferin talked about a salary cap – but could it ever happen?', *The Guardian* (online at 9 July 2017) <<https://www.theguardian.com/football/2017/jul/09/uefa-ceferin-smaller-leagues-talk-wage-cap>>.

<sup>1384</sup> Ibid.

<sup>1385</sup> Ibid.

<sup>1386</sup> Gabriele Marcotti, 'UEFA president Ceferin on mission to end gap between football's haves and have nots.', *ESPN* (Blog Post, 5 June 2018) <<https://www.espn.com/soccer/blog/marcottis-musings/62/post/3517075/aleksander-ceferin-uefa-president-exclusive-interview-with-espn-fc>>.

<sup>1387</sup> Teddy Cutler, 'UEFA President Aleksander Ceferin reveals plans for 'luxury tax' on elite clubs', *News Week* (Web Page, 23 March 2017) <<https://www.newsweek.com/aleksander-ceferin-uefa-premier-league-luxury-tax-sport-572596>>. See also Uefa president hints at luxury tax and transfer changes to rein in rich clubs', *The Guardian* (online at 23 March 2017) <<https://www.theguardian.com/football/2017/mar/22/uefa-president-luxury-tax-transfer-system-rich-clubs>>.

<sup>1388</sup> Ibid.

<sup>1389</sup> Marcotti (n 1386) 4.

clubs; the lack of previous restrictions applying to European football; and the likelihood that any measures adopted would breach ECL. These reasons were fully explored when discussing the alternatives to the FFP regulations in Chapter 9. Further, from UEFA's perspective, the need for consensus is crucial and the chance of maintaining this if major changes relating to player movement and/or financial restraints were introduced would be slim. However, before considering what UEFA can do in this situation it is important to determine whether competitive balance is necessary for European football and in this respect there are two areas to examine: the current situation and the particular characteristics of European football.

### 10.3 *Competitive Balance and European Football*

Research by Ramchandani et al suggests there is 'evidence of a decline in overall competitive balance...in four of the "big five" European football leagues (the exception being Italy) over the last two decades'.<sup>1390</sup> This finding contradicts some of the work on earlier periods of the European football leagues and may be linked to 'the inception of lucrative broadcasting rights packages in the mid-1990s that have enhanced club revenue profiles'.<sup>1391</sup> The vast discrepancy in incomes between the wealthy and poorer clubs has become more pronounced in recent years and those differences could increase in the future rather than lessen. This could lead to further declines in competitive balance unless some action is taken to control the wealth differentials.

However, it is also important to acknowledge how well European football is progressing at present. Using the latest figures available, revenue growth for 2018 was €980 million<sup>1392</sup> and between 2009 and 2018, total European club revenue grew by 80%<sup>1393</sup> with 29 European countries reporting revenue growth of more than 5% in 2018.<sup>1394</sup> Domestic television contributed 40% of the revenue growth in 2018<sup>1395</sup> with both gate receipts and commercial revenues up by 10%.<sup>1396</sup> These increases show the continued popularity of European football, but they must be put into perspective. Seventy-five per cent of the total revenue generated by the five largest leagues, namely, England, Spain, Germany, Italy and France.<sup>1397</sup>

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<sup>1390</sup> Girish Ramchandani, Daniel Plumley, Sophie Boyes and Rob Wilson, 'A longitudinal and comparative analysis of competitive balance in five European football leagues' (2018) 24(5/6) *Team Performance Management* 265, 276.

<sup>1391</sup> *Ibid.*

<sup>1392</sup> UEFA (n 985) 60.

<sup>1393</sup> *Ibid.*

<sup>1394</sup> *Ibid.* 61.

<sup>1395</sup> *Ibid.* 64.

<sup>1396</sup> *Ibid.* 65.

<sup>1397</sup> *Ibid.* 59.

On a more general level, the FFP Regulations have brought a basic financial stability to European football with clubs having to operate within the breakeven provision. It does however, go further than this. The financial stability of the clubs in a competition is crucial to the integrity of that competition because, as previously discussed, the inability of a club to fulfil its fixture list can lead to credibility issues.<sup>1398</sup> European football should not experience these problems and any unethical issues that can arise from them.<sup>1399</sup> It, therefore, has a solid base upon which to build. Competitive balance is a useful component for a competition to have but it is an additional benefit and not as fundamental as financial stability.

Reference to the source of the competitive balance issue in European football is also important. The competitive imbalance appears to be in the national leagues that supply the contestants for UEFA's competitions rather than in the UEFA competitions themselves. In La Liga, Real Madrid won the 2020 competition by five points from its nearest rival, Barcelona, with the third club, Atletico Madrid, a further 17 points behind.<sup>1400</sup> Barcelona has won the La Liga title eight times in the last 12 seasons.<sup>1401</sup> In 2020, Juventus won the Italian League (Serie A) for the ninth time in a row.<sup>1402</sup> Similarly, PSG beat their nearest rival, Lille, by 12 points in Ligue 1 in 2020, their seventh win in eight years.<sup>1403</sup> In the Scottish Premiership, Celtic has won the last nine competitions and either Celtic or Rangers has won the last 35 championships.<sup>1404</sup> These results reveal a definite lack of competitive balance and, although some of the other

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<sup>1398</sup> If a team is unable to fulfil its fixtures, not only will fixtures involving that club have to be cancelled but it also raises the difficult problem of how to deal with the results involving that club. One possibility might be to expunge all previous results of the departing team from the competition for that season, taking away points from teams that had achieved positive results against the departing team, which would prevent the need for a point adjustment for the cancelled games. Alternatively, the results of the earlier games might be allowed to stand with all future cancelled games against the departing team being treated as a win for its opponents. In either case, the outcome can be seen as a distortion of the competition and bring it into disrepute, which could lead to an adverse effect on sponsors and broadcasters.

<sup>1399</sup> Portsmouth's financial plight in 2010 provides an example of this with West Ham's chairman, David Gold, offering to loan Portsmouth £10 million to allow it to stave off liquidation and complete its fixtures for the season, and thus prevent his club from being relegated. If this loan had proceeded and West Ham had avoided relegation, the integrity of the Premier League would have been called into question. See '£2.5million per point', *Kumb.com* (Web Page, 19 February 2010) <[www.kumb.com](http://www.kumb.com)>.

<sup>1400</sup> Avi Creditor, 'Real Madrid wins La Liga title for record 34th time', *Sports Illustrated* (Web Page, 16 July 2020) <<https://www.si.com/soccer/2020/07/16/real-madrid-wins-la-liga-title-spanish-champions>>.

<sup>1401</sup> Martina Alcheva, 'Spanish La Liga Winners List – Past all time winners 1929–2020', *SillySeason* (Web Page, 18 July 2020) <<https://sillyseason.com/list/spanish-la-liga-winners-list-past-winners-list-82304/>>.

<sup>1402</sup> 'Juventus claim ninth successive serie A title with win over Sampdoria', *ESPN* (Web Page, 27 July 2020) <<https://www.espn.com.au/football/juventus/story/4145343/juventus-claim-ninth-successive-serie-a-title-with-win-over-sampdoria>>.

<sup>1403</sup> Can Erozdin, 'Paris Saint-Germain declared 2020 champions in France', *AA* (Web Page, 30 April 2020) <<https://www.aa.com.tr/en/sports/paris-saint-germain-declared-2020-champions-in-france/1824888>>.

<sup>1404</sup> Ewan Murray, 'Proud Neil Lennon says no one could have stopped Celtic winning title', *The Guardian* (online at 19 May 2020) <<https://www.theguardian.com/football/2020/may/18/celtic-confirmed-as-scottish-champions-and-hearts-relegated-from-premiership>>.

European leagues are perhaps not quite as bad as the examples quoted, some still tend to be non-competitive. The UEFA club competitions currently comprise the UCL and the UEL1. In the UCL, five different clubs have won the title in the last decade despite Real Madrid winning four of those titles.<sup>1405</sup> Furthermore, there were eight different winners in the previous decade.<sup>1406</sup> Similarly, the UEL1 has seen six different winners in the last decade, including Sevilla with three consecutive wins between 2014 and 2016 and a fourth in 2020,<sup>1407</sup> while in the previous decade there were nine different winners.<sup>1408</sup>

The figures reveal that it is the national leagues that are uncompetitive, with UEFA's own competitions having 'reasonable equality'.<sup>1409</sup> This point is important because UEFA would need to look very carefully at any proposed changes to make the national leagues more competitively balanced because changes at the national league level may affect the competitive balance which UEFA currently has within its own competitions. Furthermore, the 2019–20 season saw closer competitions in the Bundesliga and Serie A and, in England, Liverpool won the Premier League for the first time in the league's 28 year history.

However, the current situation is not the only factor affecting competitive balance. The particular characteristics of football are also relevant to the issue. All sports are open to a surprise result but football appears to be more susceptible than most. A better team on paper can sometimes be beaten by a lesser quality side, particularly if luck, poor refereeing decisions, injuries or difficult playing conditions affect the game. Football has a low scoring system compared with other football codes, awarding only one point for scoring a goal, which means that teams can remain in the contest for long periods of the game. A better team can be a goal ahead and in control of the game with the majority of ball possession only to make one mistake or suffer a breakaway attack giving the team behind, the opportunity to be back on level terms. Similarly, it is possible for a weaker team to score an early goal with the better team pressing

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<sup>1405</sup> 'UEFA Champions League – winners and history', *Football History* (Web Page, 25 December 2020) <<https://www.footballhistory.org/tournament/champions-league.html>>.

<sup>1406</sup> Ibid.

<sup>1407</sup> 'UEFA Europa League – winners and history', *Football History* (Web Page, 25 December 2020) <<https://www.footballhistory.org/tournament/europa-league.html>>.

<sup>1408</sup> Ibid.

<sup>1409</sup> Davies (n 88) 71. Davies says, 'Thus, in relation to how many teams in a given decade win the competition, a totally even competition would have ten different teams winning the premiership, while an uneven competition would have around three or four teams winning the competition. Therefore, a reasonably even competition would be one having six to seven different teams winning the premiership in a given decade.'

for an equaliser but failing to score due to bad luck or, on occasions, only to find the weaker team scores a second goal in a breakaway attack. In addition, football is not as physical as other football codes so this once again provides the underdog team with a greater chance of causing an upset. Stronger teams tend to prevail in other football codes but this does not apply as regularly in soccer matches.

Furthermore, as already discussed, European football leagues are different to some other competitions, because they have the additional element of promotion and relegation to develop excitement and interest in their matches. The impact of the promotion and relegation aspect adds an extra dimension to the European national leagues adding considerable significance and interest to late season games between lower placed teams.<sup>1410</sup>

In addition, there is also interest developed in these national leagues as to which teams are going to qualify for the UEFA competitions. In the EPL, for instance, the top four teams qualify to play in the UCL and there is also usually interest in who is going to finish between fifth and seventh because these teams are likely to qualify for the UEL1.<sup>1411</sup> This adds interest to matches between mid-table teams which cannot win the league but which can qualify for the financially lucrative and prestigious UEL1.

A further consideration is that most countries also have at least one knockout Cup competition. In England there are two, the FA Cup and the EFL Cup (currently known as the Carabao Cup for sponsorship reasons) each of which gives the winners entry to the UEL1.<sup>1412</sup> France has two Cup competitions, the Coupe de France and the Coupe de Ligue,<sup>1413</sup> and Scotland has three, the Scottish Cup, the Scottish League Cup and the Scottish Challenge Cup.<sup>1414</sup> There are, therefore, a number of different competitions for clubs in national leagues to play in, and this brings great interest to the national game overall, even if the main competition (the

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<sup>1410</sup> The NFL, NBA and MBL in the US, and the AFL and NRL in Australia are examples of closed competitions where the same teams compete against each other every season.

<sup>1411</sup> 'European qualification for UEFA competitions explained', *Premier League* (Web Page, viewed 28 May 2019) <<https://www.premierleague.com/european-qualification-explained>>.

<sup>1412</sup> Richard Parry, 'UEFA Champions League and Europa League places: The permutations for 2018–19 European qualification', *The Standard* (online at 16 April 2018) <<https://www.standard.co.uk/sport/football/tottenham/uefa-champions-league-europa-league-places-permutations-for-201819-european-qualification-a3814896.html>>.

<sup>1413</sup> 'Football in France', *French-Property.com* (Web Page, 20 April 2020) <<https://www.french-property.com/reference/football-france/>>.

<sup>1414</sup> 'Leagues and Cups – Football', *BBC Sport* (Web Page, viewed 20 April 2020) <<https://www.bbc.com/sport/football/leagues-cups>>.



national league) itself is not competitive. Lower-ranking teams have a realistic opportunity of doing well and even winning these Cups, because each round comprises a series of one-off games against the teams drawn against each other and with no seeding of the better clubs to prevent them from playing each other in the early rounds.<sup>1415</sup> Thus, even though these lower-ranking teams do not have a realistic chance of winning their league, they do have a chance to win a trophy in any season.

Finally, the history and development of some of the clubs in European football can create a special interest amongst followers of the UEFA competitions. The success of an outstanding club in a competition over a number of years can heighten and increase supporters' respect and enthusiasm for that competition and the sport generally. This interest may even exceed the desire for competitive balance. Real Madrid's history, for instance, has been based on the legendary team of the late 1950s, which contained players of the quality of Raymond Copa, Hector Rial, Alfredo di Stefano, Ferenc Puskas and Francisco Gento, and which won the European Cup five times in a row between 1956 and 1960. This team would not have been possible under a 'hard' salary cap regime.<sup>1416</sup>

Thus, while competitive balance is missing from some of the European national leagues, this does not appear to be having a deleterious effect on the quality of European football or the support it obtains from the general public which, in turn, continues to nurture plenty of media and sponsorship interest. Competitive balance could clearly be improved in the national leagues but the available evidence does not suggest that it should be addressed as a matter of necessity. Revenue streams in the areas of broadcasting, sponsorship and gate receipts increased by 114% (€4.2 billion), 73% (€2.7 billion) and 26% (€0.7 billion), respectively, in

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<sup>1415</sup> Seeding is used in UEFA's competitions and it is suggested that it should continue. If the better sides did not reach the later rounds, competitions would lose their prestige, viewer interest and support from broadcasters. It is, therefore, not only important from a reputational perspective but also from an economic viewpoint that the better teams should have a good chance of reaching the closing stages of UEFA's competitions. Competition revenue is crucial to UEFA and this is significantly enhanced when the better teams contest the later rounds of its competitions. Similarly, the group stages act as a type of seeding and should remain. Where groups are used, the better teams have a greater chance of advancing to the next stage and more games are also played which again provides more revenue. Although seeding is important to UEFA's competitions, in the Cup competitions in the European national leagues having no seeding gives the lesser teams a greater chance of success that brings excitement and the chance of the unexpected to occur, which is beneficial in these circumstances.

<sup>1416</sup> Another club still creating special interest among European football followers is Manchester United. On 6 February 1958, eight of its first team players were tragically killed in the Munich air disaster on their way home from a European Cup quarter final clash with Red Star Belgrade. It took surviving manager, Sir Matt Busby, 10 years to build a new team capable of winning the European Cup in 1968, after several near misses.

the period 2009–2018,<sup>1417</sup> leading to many European clubs ‘posting their highest revenue figures of all times’.<sup>1418</sup> Ramchandani et al suggest ‘while this remains the case, it can be proposed that there is no real reason to change or challenge the status quo’.<sup>1419</sup>

However, it is likely that financial differentials between the wealthy clubs and the others will continue to increase rather than lessen and this may lead to further declines in competitive balance. Bearing this in mind, it would be remiss of UEFA to ignore the potential problem even if major difficulties are not currently being experienced. It may be prudent, therefore, for UEFA to act now before the situation becomes more detrimental and harder to reverse.

There is also clearly some unrest amongst some of the second-tier countries because they are not receiving a reasonable opportunity to improve to allow their teams to compete against the better clubs. Several representatives from these leagues have commented on the situation such as Jacco Swart, CEO of the Eredivisie, the top division in the Netherlands, who stated:

At the Eredivisie we take the issue of competitive balance very seriously. We have recently approved a new regulation in the Netherlands for sharing among all clubs a percentage of the revenue coming from UEFA Club Competitions. It would be logical for UEFA to follow this good example by implementing a fairer revenue distribution model that could compensate the growing financial gap between a few top clubs and all the others, both in international as well as in domestic competitions.<sup>1420</sup>

Claus Thomsen, CEO of the Danish National League made a similar comment:

In Denmark we have been having an open dialogue with our Federation, since it is our common interest to have a competitive and compelling league at national level and at the same time to have Danish clubs performing well in the international

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<sup>1417</sup> UEFA, ‘The European Club Footballing Landscape – Club Licensing Benchmarking Report Financial Year 2018’, *UEFA.com* (Web Page, 2018) 60 <[https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/63/79/75/2637975\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/63/79/75/2637975_DOWNLOAD.pdf)>.

<sup>1418</sup> Ramchandani et al (n 1390) 279.

<sup>1419</sup> *Ibid.*

<sup>1420</sup> Kunal Dhyani, ‘UEFA Club Competition model a threat to European Football: La Liga’, *Inside Sport* (Web Page, 14 December 2018) <<https://www.insidesport.co/uefa-club-competition-model-a-threat-to-european-football-laliga/>>.

competitions. We have both asked UEFA to reconsider the way financial resources are redistributed so as to achieve these goals.<sup>1421</sup>

Swiss Football League CEO Claudius Schafer also remarked:

[W]e are requesting that UEFA increase the level of compensation in a substantial way in order to manage the huge financial gap between Swiss clubs regularly participating to UEFA Competitions and the remaining clubs playing solely at domestic level. It's becoming imperative to better protect the competitive balance of national leagues to guarantee the long-term sustainability of European football.<sup>1422</sup>

Thus, the solution as suggested may be a redistribution of the income so that lesser-ranked clubs receive a larger share of the revenue than they currently do to allow them to establish more competitive national leagues and for their clubs to be more competitive at the European level. These quoted CEOs are not requesting competitive balance between each and every club, but a fairer share of the revenue which UEFA receives, to give them the opportunity to enhance and improve their clubs' standings in European football. This appears to be a sensible and pragmatic approach, which could provide UEFA with a realistic chance of success in pursuing this goal.

A restructuring of UEFA's competitions may help provide a resolution to the problem. UEFA's competitions are its main activity and the major provider of its income. This income from its competitions is significant and it is therefore important to see how it is treated and whether its distribution might have an effect on competitive balance between the clubs under its jurisdiction. A general consideration of UEFA's competitions would also seem warranted as they play such a major role within UEFA's portfolio of activities. Finally, bearing in mind the concerns of the personnel involved in some of the second-tier countries, it seems

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<sup>1421</sup> Ibid 2.

<sup>1422</sup> Ibid. Claudius Schafer's remarks have been supported by Marcin Animucki, President of the Polish National League, who was quoted as saying, 'To be honest we were expecting UEFA to introduce an even more inclusive access list for UEL2, but overall we welcome a format which will give to more clubs from more countries the possibility to play in Europe. It is now time to review the financial model. Champions League clubs are receiving too much money from UEFA. We need more money to be shared among all clubs, and especially, among those clubs not participating to international competition. At the Ekstraklasa we work to provide most of our clubs the chance to compete and win the Polish championship while dreaming to play in Europe. UEFA has a huge responsibility to keep this dream alive for all our clubs.'

appropriate to revisit luxury tax options which might provide the means to obtain some additional funds to assist clubs at the lower levels of European football.

There are, therefore, four main areas to explore. They are the distribution of competition prize money; UEFA's competitions; the possible introduction of a European Super League (ESL); and luxury tax options. While luxury taxes as used in other leagues like the MLB have effectively been rejected in regard to European football, what will be explored is a luxury tax as a means of obtaining money for the solidarity fund.

#### *10.4 Distribution of Prize Money*

The amount of money generated from UEFA's competitions 'is estimated at around €3.25bn' for the 2019–20 season.<sup>1423</sup> From this figure an amount of €295 million is set aside for organizational and administrative costs relating to the competitions and €237.5 million set aside for solidarity payments. Of the remaining net revenue 6.5% is reserved for European football and the other 93.5% is distributed to the participating clubs.<sup>1424</sup> The UCL has a total of €2.04 billion in prize money to be divided between the participating clubs.<sup>1425</sup> A club's share depends on its performance in the competition but each of the 32 clubs qualifying for the group stage receive €15.25 million.<sup>1426</sup> The winners of the competition receive a sum in excess of €80 million.<sup>1427</sup> The total prize money to be divided between the participating clubs in the UEL1 amounts to €510 million, with each of the 32 clubs qualifying for the group stage receiving €2.92 million.<sup>1428</sup> The winners of the competition receive a sum in excess of €20 million.<sup>1429</sup> With such large amounts of prize money being paid to the successful clubs, it is difficult to view the present situation as assisting competitive balance. Whilst it is right that the clubs which perform well are rewarded for their efforts, the prize money would seem to give those clubs an unhealthy financial advantage over their rivals.

A closer examination of the figures reveals a large differential in prize money between the UCL and the UEL1. In the 2019–20 season, the total prize money for the UCL was €2.55

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<sup>1423</sup> UEFA, 'How clubs' 2019/20 UEFA Champions League revenue will be shared', *UEFA.com* (Web Page, 11 July 2019) <<https://www.uefa.com/uefachampionsleague/news/0253-0e99cd398188-f80e968d0ab3-1000--how-clubs-2019-20-uefa-champions-league-revenue-will-be-shared/>>.

<sup>1424</sup> *Ibid.*

<sup>1425</sup> *Ibid.* 2.

<sup>1426</sup> *Ibid.* 3.

<sup>1427</sup> *Ibid.*

<sup>1428</sup> *Ibid.* 4.

<sup>1429</sup> *Ibid.*

billion with the UEL1 prize money being €510 million.<sup>1430</sup> On the basis that revenue enables clubs to obtain and employ the best players, it is difficult for UEL1 teams to compete for players with the teams in the UCL. Further, in the competitions themselves the division of prize money appears, to some extent, to favour the well-established clubs. Part of the prize money is based on a 10 year coefficient ranking derived from the clubs' performances in UEFA's competitions over the previous 10 years, with the lowest-ranked team receiving one share and the highest-ranked team receiving 32 shares.<sup>1431</sup> Another part of the prize money, the market pool, is distributed 'according to the proportional value of each television market represented by clubs taking part from the group stage onwards'.<sup>1432</sup> This means that those clubs which come from a national association with a larger media rights market, such as England, will receive larger shares than a club from a national association with a smaller market.<sup>1433</sup> Similar arrangements apply in the UEL1 but their pool sizes are smaller.<sup>1434</sup>

UEFA's rules recognise the contributions of clubs towards competition revenue by rewarding those which play in the greater revenue-producing competition, the UCL, and which have contributed to the success of UEFA's competitions over a ten year period, as well as providing more funds to the television market due to the size of the audience in their countries. From a financial perspective these rules seem to be applied fairly and reasonably. However, from a competitive balance perspective, a more egalitarian approach may be beneficial to the competitions as a whole.

Currently 7%, which amounts to approximately €237.5 million of the total income from UEFA's competitions is set aside for solidarity payments.<sup>1435</sup> Of this, 3% (approximately €107.5 million) is provided to clubs which appear in the qualifying rounds of the UCL and the UEL1 and the other 4% (approximately €130 million) is distributed to national associations for clubs which have not participated in the UEFA competitions.<sup>1436</sup> The European Leagues

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<sup>1430</sup> Ibid 2

<sup>1431</sup> Ibid 3. For 2019, from the total pool of €584 million, the lowest-ranked club received €1.108 million and the highest-ranked team received €35.46 million.

<sup>1432</sup> Ibid. The market pool was estimated at €292 million for 2019–20. Half of the amount representing the value of each market is split among the clubs based on their performance in the previous domestic championship and the other half is paid in proportion to the number of matches played by each club in the Champions League.

<sup>1433</sup> Ibid.

<sup>1434</sup> Ibid 5. The coefficient ranking and the market pools were €84 million and €168 million, respectively, in the Europa League for the 2019–20 season.

<sup>1435</sup> Ibid 1.

<sup>1436</sup> Ibid 6.

have proposed an increase in solidarity payments to 20% for clubs not participating in European competitions, and smaller leagues and federations.<sup>1437</sup>

Subject to stakeholder agreement, the solidarity payment should be increased significantly so that more of UEFA's revenue from its competitions is used to support the poorer clubs and grassroots football. A percentage in the region of 20–25% would seem to be a reasonable figure to try to agree upon. The percentage figure would be ultimately decided by the national associations but it is important for there to be general stakeholder support. A higher percentage would be better from a solidarity perspective but it is unlikely that the larger clubs would be prepared to go above a percentage of about 20–25%. Although if they could be persuaded to go higher, a more even spread of income would be beneficial for European football. To make it more appealing to stakeholders, the percentage could be graduated from 15% with a 1% increase per year over the next 10 years until it ultimately reaches 25%. European football is currently experiencing very strong support from the general public and UEFA needs to harness this situation to its own and European football's advantage. It could do that by ensuring the rudiments of the sport are properly catered for, and the structure is in place, so the sport can continue to develop successfully into the future. It also needs to do what it can to slow down and reduce, if possible, the increasing gulf between the wealthy clubs and the poorer clubs to avoid a decline in competitive balance. An increase in the solidarity payment percentage should assist this and is a more indirect and therefore potentially more palatable means of reducing the income of the wealthy clubs than introducing more direct financial restraints such as a luxury tax.

### *10.5 UEFA's Competitions*

UEFA's competitions provide a good income and it is, therefore, only sensible to consider whether this income could be increased by further competitions. UEFA has taken this path and has developed a UEFA Europa Conference League (UEL2) which is due to commence in 2021. The format of the competition 'will mirror the existing UCL and UEL1 and feature 32 teams in a group stage'.<sup>1438</sup> The winners of the new competition will be entitled to compete in the UEL1 in the following season.<sup>1439</sup> UEFA President, Ceferin, said that '[t]he new UEFA club competition makes UEFA's club competitions more inclusive than ever before. There

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<sup>1437</sup> Kunal Dhyani (n 1420) 2.

<sup>1438</sup> UEFA, 'UEFA Executive Committee approves new club competition', *UEFA.com* (Web Page, 2 December 2018) <<https://www.uefa.com/insideuefa/about-uefa/news/024c-0e9941616a90-f26bd21de788-1000--uefa-executive-committee-approves-new-club-competition/>>.

<sup>1439</sup> *Ibid.*

will be more matches for more clubs, with more associations represented in the group stage.’<sup>1440</sup>

A number of the national leagues have shown concern with the new competition and are worried that it ‘risks creating a further divide within leagues of those who have lucrative European football and those who don’t’.<sup>1441</sup> Claus Thomsen, CEO of the Danish National League recently stated that ‘we believe it is fundamental to review the whole distribution system, from Champions League to Europa League and the new competition, in order to generate a positive impact for all professional clubs’.<sup>1442</sup> Swiss Football League CEO Claudius Schafer stated that ‘with the new format (UEL2) we will have less clubs playing in UEL1 and more clubs playing for UEL2 which is a competition of lower level and prestige. The access to UEL1 is getting stricter, following the path of the Champions League to become a more elite competition’.<sup>1443</sup> This may be a difficult issue for UEFA to resolve, although a revised revenue distribution might at least give some of the poorer clubs a better chance of improving their positions and making national leagues more competitive.

UEL2 will increase the number of countries involved in the group stage of UEFA competitions from 26 to 34.<sup>1444</sup> However, although the winner of every European League will still be eligible to enter the UCL, only teams from UEFA’s top 15 countries will be allowed into the UEL1 apart from the winning team of UEL2 which secures an automatic qualification for the next season’s UEL1. This means that a number of teams which would have gone into the UEL1 will now play in UEL2, but with a better chance of reaching the group stage. The division of the clubs into three competitions, rather than two, may lead to clubs of more equal playing ability competing against each other. That may, in consequence, also provide a greater competitive edge to the football matches that take place. However, the new competition only provides for 16 new clubs to play European football. Marcin Animucki, President of the Polish National League, has stated ‘[t]o be honest we were expecting UEFA to introduce an even more inclusive access list for UEL2, but overall we welcome a format which will give to more clubs from more countries the possibility to play in Europe.’

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<sup>1440</sup> ‘UEFA approve new European club competition from 2021’, *The Sydney Morning Herald* (online at 3 December 2018) <<https://www.smh.com.au/sport/soccer/uefa-approve-new-european-club-competition-from-2021-20181203-p50jsr.html>>.

<sup>1441</sup> Dhyani (n 1420) 1.

<sup>1442</sup> *Ibid* 2.

<sup>1443</sup> *Ibid* 3.

<sup>1444</sup> *The Sydney Morning Herald* (n 1440) 2.

UEFA's introduction of the new UEL2 appears to be a move in the right direction, although it only increases the total number of clubs playing in its competitions from 80 to 96.<sup>1445</sup> After it has operated for two to three seasons, one would expect UEFA to evaluate the success of its new competition to see if changes to its initial format would be appropriate. It may be possible to open the competition to more clubs or even commence a further competition, UEL3, which might also provide an opportunity for more clubs and countries to become involved in the European football competitions. Any new competition may also need to be subsidised because sponsorship and/or broadcasting revenue may be limited. However, if this is the case, solidarity money could be made available from the other three UEFA competitions.

### *10.6 The Establishment of a European Super League (ESL)*

Another option that should be considered is an ESL containing the top sides in Europe playing each other on a regular basis. UEFA has already indicated that it would like to make changes to its UCL format commencing in 2024. It is not entirely clear what they propose but some of the ideas seem to include playing more games in the Champions League;<sup>1446</sup> 'introduc(ing) multiple levels to the competition';<sup>1447</sup> 'relegation and promotion';<sup>1448</sup> and having matches 'take place on the weekend.'<sup>1449</sup> One possible option suggested is 'changing the current group stage from eight groups of four to four groups of eight, guaranteeing clubs far more Champions League games from 2024'.<sup>1450</sup> Linked with this is '[a] tiered system involving relegation and promotion' which 'could see the top six teams of each group automatically qualify for the following year's competition rather than through their domestic leagues'.<sup>1451</sup>

Reaction to the initial discussions has been swift with Lars-Christer Olsson, President of the European Leagues, stating that '[o]ur major objective is to safeguard the domestic

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<sup>1445</sup> Dhyani (n 1420) 1.

<sup>1446</sup> Kieran Canning, 'Premier League voices 'significant concerns' over Champion League reforms', *Chicago Tribune* (online at 5 April 2019) <<https://www.chicagotribune.com/90minutes/ct-90mins-premier-league-voice-significant-concerns-over-champions-league-reforms-20190405-story.html>>.

<sup>1447</sup> John Dillon, 'European Club Association and UEFA deliberate a new Champions League in 2024', *Bavarian Football Works* (Web Page, 27 March 2019)

<<https://www.bavarianfootballworks.com/2019/3/27/18283445/bayern-munich-andrea-agnelli-european-club-association-uefa-champions-league-format-weekend-2024>>.

<sup>1448</sup> *Ibid* 2.

<sup>1449</sup> 'European Leagues say will not allow UEFA competitions at weekends', *The Sydney Morning Herald* (online at 4 April 2019) <<https://www.smh.com.au/sport/soccer/european-leagues-say-will-not-allow-uefa-competitions-at-weekends-20190404-p51anz.html>>.

<sup>1450</sup> 'The Straits Times, Premier League voices fears over proposed Champion League reforms', *The Straits Times* (online at 5 April 2019) <<https://www.straitstimes.com/sport/football/football-premier-league-voices-fears-over-proposed-champions-league-reforms>>.

<sup>1451</sup> *Ibid*.



competitions and protect them’,<sup>1452</sup> and General Secretary Alberto Colombo adding that ‘[w]e will not allow European club competition to be played at weekends’.<sup>1453</sup> One of the strongest dissenting voices came from the EPL which said ‘[a]ll clubs unanimously agreed it is inappropriate for European football bodies to create plans that would alter the structures, calendar and competitiveness of the domestic game and will work together to protect the Premier League’.<sup>1454</sup> Interestingly, ECA Chairman Andrea Agnelli took a more temperate approach stating ‘that the goal of the expanded format is to create a system in which all clubs from across Europe can participate and in which they can grow’.<sup>1455</sup>

The reaction is not unexpected with parties protecting their positions. The European Leagues would clearly be most affected by these changes and the EPL would probably have the most to lose as it is the most successful and competitive of the European Leagues. Their defensive stance is therefore perfectly understandable. The ECA was more receptive to the initial proposals but this probably arises because the topic may be of some interest to at least some of its members. However, even the ECA declined to show any interest in the proposal advanced by FIFA President Gianni Infantino, for a Club World Cup featuring 24 teams. However, although this was almost certainly due to the lack of information provided by Infantino about who ‘would receive the rights to the competition’ and what rights were to be sold to the ‘mysterious \$25 billion consortium’.<sup>1456</sup>

The concerns shown by the various bodies to UEFA’s initial suggestions for the UCL and FIFA’s Club World Cup proposal indicate that any attempt to introduce a European Super League is going to incur resistance, but it does need to be considered because it provides a possible way of curing the problem of competitive imbalance. The French, German and Italian national leagues have been dominated by PSG, Bayern Munich and Juventus, respectively, over the past several seasons and the Ukrainian national league is showing signs of a similar trend emerging with the growing dominance of Shakhtar. La Liga in Spain has been controlled by two clubs, Real Madrid and Barcelona, and the Primeira Liga in Portugal has a similar

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<sup>1452</sup> Kieran Canning (n 1446) 2.

<sup>1453</sup> The Sydney Morning Herald (n 1449) 2.

<sup>1454</sup> ‘Premier League voices fears over proposed Champions League reforms’, *The South African* (Web Page, 5 April 2019) <<https://www.thesouthafrican.com/sport/soccer/epl/premier-league-voices-fears-over-proposed-champions-league-reforms/>>.

<sup>1455</sup> John Dillon (n 1447) 2.

<sup>1456</sup> *Ibid.* The ‘mysterious \$25 billion consortium’ is the group who are prepared to invest \$25 billion into the setting up and running of the proposed Club World Cup.

pattern with Benfica and Porto dominating. In the EPL, there has been a considerable gulf between the top six clubs and the others for a number of years.

The concept of an ESL is not a new one. Back in 2007, Vrooman suggested that 30 of the top-revenue clubs be divided into three 10 team regional conferences with each team playing ‘the customary 38-game schedule’<sup>1457</sup> comprised of ‘18 matches within the conference, and one match each with the 20 teams in the other two conferences’.<sup>1458</sup> Vrooman recommended that ‘the season would conclude with an eight-team knockout championship tournament with the top two clubs from each conference and two wild cards teams’.<sup>1459</sup> He also advised that ‘the fragmented national league base be integrated into an association of international leagues’.<sup>1460</sup> Vrooman’s ESL also involved ‘equal revenue sharing of all television rights fees, and a hard payroll cap of 64% of league revenue with a minimum payroll of 75% of the cap’.<sup>1461</sup> The league was to be ‘self-governed’.<sup>1462</sup> The concept of an ESL has also been proposed by Ramchandani et al who maintain that ‘a breakaway European Super League (by removing the ‘top’ teams in respective leagues) may bring about a more balanced league comprising of the other clubs left behind in their own domestic leagues’.<sup>1463</sup>

The ESL proposal put forward in this thesis differs from Vrooman’s model in several ways. First, the proposed ESL should comprise the top 20 clubs in Europe. They would play in a League format with a total of 38 home and away matches taking place. The winners of the competition would be the clubs scoring the most points from the 38 games with three points being awarded for each win and one point for each draw. It would not be a closed competition, so there would be relegation from the ESL with the two clubs accruing the least points being relegated back to the premier division of their national leagues. The winner and runner-up in the UCL would take the place of the two relegated clubs from the ESL. The UCL, UEL1 and UEL2 would continue in their present format with the winner in each being awarded an automatic place in the next higher European competition for the following season. Other entrants into the UCL, UEL1 and UEL2 would be awarded places in accordance with where those clubs finish in their national leagues, as is currently the case. With the departure of the

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<sup>1457</sup> John Vrooman, ‘Theory of the Beautiful Game: The Unification of European Football’ (2007) 54(3) *Scottish Journal of Political Economy* 314, 350.

<sup>1458</sup> *Ibid.*

<sup>1459</sup> *Ibid.*

<sup>1460</sup> *Ibid* 351.

<sup>1461</sup> *Ibid* 348.

<sup>1462</sup> *Ibid* 349.

<sup>1463</sup> Ramchandani et al (n 1390) 278.

20 clubs from the UCL to the ESL, their places in the UCL would be available to accommodate new entrants from the national leagues. This arrangement should also apply to the UEL1 and UEL2, thus allowing more clubs to participate in these competitions than previously.

In essence, the proposed ESL would simply be an additional top league placed above UEFA's other competitions, with the better teams from the national leagues making up this Super League. Vrooman's proposal advocated that the ESL be self-governed. However it would be better for European football as a whole if UEFA maintained control of this proposed ESL. A new ESL would immediately become the main drawcard of European soccer, attracting the bulk of the media, sponsorship and public interest. The income from it would be enormous and, conversely, the interest in the other competitions, the UCL, UEL1 and UEL2, would decline, with the top clubs no longer being part of them. Potentially, this proposed ESL is likely to become the main source of income for European football, so UEFA would need to control the purse strings of the ESL. If UEFA is to look after the interests of European football at all levels it will need to ensure that a reasonable percentage of the revenue from the proposed ESL goes into the solidarity fund.

Another useful variation to Vrooman's proposal would be promotion to and relegation from the ESL so it would not be an isolated competition but form part of UEFA's suite of competitions. This would provide the current second tier teams with an opportunity to improve and progress to the ESL and also provide additional excitement to both the ESL and UCL competitions. This arrangement contrasts with Vrooman's US style model of a closed competition with a salary cap and revenue sharing to ensure competitive balance.<sup>1464</sup> Promotion to the ESL should not cause difficulties with the winners and runners-up of the UCL being the teams to join the ESL. However, relegation is perhaps not so straightforward as there would be two relegated teams to accommodate in their respective national leagues. The simplest way to deal with this situation would be to increase the size of the national league(s) to accommodate the relegated club(s).<sup>1465</sup>

A further variation on Vrooman's model is in the number of teams in the ESL. Vrooman's model allows for 30 teams whereas the model proposed here is for 20 teams. This number has been chosen so that the teams in the ESL can play in the one competition rather than have

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<sup>1464</sup> Vrooman (n 1457) 348.

<sup>1465</sup> Two issues would potentially arise from this solution. First, the national leagues would have a slightly increased fixture list. Secondly, the relegation process may lead to an odd number of teams in the national league which would create the need for each club to have a 'bye' round on a rotational basis.

three divisions and a knockout competition to decide the winner.<sup>1466</sup> The competition is also constructed so that each side can play all the others at home and away which is better than the 30 team model because it is a fairer test of the teams' abilities.

The selection of the initial clubs to join the ESL would be an interesting but potentially tricky exercise. Vrooman based his selections on the main criterion of club revenue.<sup>1467</sup> However, the model proposed here would apply two fundamental criteria: (1) sides should be selected on merit, taking into account their performance in recent UEFA competitions; and (2) the competitive balance of the teams in each national league would also need to be assessed and considered. The importance of fairness in the selection process cannot be understated. It is crucial that if an ESL is formed it contains the best teams in Europe. Otherwise, the concept of the ESL may be challenged and its success and integrity undermined. Competitive balance is the main reason for this ESL proposal and, therefore, it would be inappropriate to consider making changes to the national leagues without evaluating the effect the proposed ESL is likely to have on competitive balance in those leagues. This means, for instance, there would be little point including in the ESL the Scottish side Celtic, if Rangers was not also offered a place, because the Scottish Premier League would be left unbalanced if Rangers remained in that competition without Celtic. If there are two sides vastly better than the others, there is at least a competitive edge between them which brings some interest to the competition.

The main strength of the proposed ESL would be to bring competitive balance to the main national leagues in European football by removing the clearly superior performing teams from the national competitions whilst, at the same time, providing a competitive tournament for those teams in Europe. The proposal would not require any imposition of financial restraint on the top teams as the restructure itself would create the sought-after competitive balance. From both an administrative and practical point of view, the restructure would seem to be perfectly feasible and there would not appear to be any difficulties from a legal perspective. With the aim of the proposed restructure being to improve competitive balance and no particular restrictions being placed on clubs, there would be no reason for the ECJ to become involved in the matter. In any event, it is unlikely that the Court would interfere with how UEFA decides to structure its competitions as there would be no obvious anti-competitive aspect.

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<sup>1466</sup> Vrooman (n 1457) 349.

<sup>1467</sup> *Ibid.*

The main weakness of the proposal would be lack of stakeholder support. A major change in the structure of European football would cause concern to those stakeholder groups which would have their status reduced in the new arrangement. This would certainly be the case for the five main national leagues as their prominent status would be eroded by the establishment of a new ESL. Further, the national associations which would vote on an ESL proposal may also have reservations about the matter. The national associations of the five main European Leagues could be concerned about weakening the standard of football in their national leagues and the other national associations could be concerned about the potential increase in the financial gap between clubs in the ESL and the clubs in their respective countries. There is clearly a risk that by healing competitive balance in the national leagues, a larger gulf could be created between the playing talent in the ESL clubs and the other European teams.

A further concern would be the financial ramifications of an ESL. The proposed new league would become the main focus of attention and the national leagues would be seen and treated as at a level below the ESL. Broadcasting and sponsorship for national leagues would likely diminish, with the media and sponsors focussing their attention on the ESL. The clubs remaining in the national league would suffer a severe impact on their revenues as their incomes from broadcasting and sponsorship would almost certainly decline. Many of the national leagues could find themselves more competitively balanced but likely at the expense of delivering a less important product and the remaining clubs within their leagues could suffer considerable financial loss. Consequently, if an ESL were to proceed, some monetary compensation would need to be made to the national leagues for their loss.

The financial issue is not only important from the perspective of major stakeholders but is also crucial for the well-being of European football. There is a real danger that if the proposed ESL were to be introduced, the vast majority of European football's income would then come from the ESL and, if the proceeds were simply passed on to the clubs competing in the ESL, the gulf between the ESL clubs and the other clubs would increase. That would, in turn, lead to a huge discrepancy between the playing talent of the ESL clubs and the other European football teams. This would create a situation which is not in the best interests of European football. It would be ironic if the ESL created better competitive balance within some of the main national leagues, but at the same time caused a massive competitive imbalance between the clubs that played in the ESL competition and those that did not. This needs to be avoided at all costs. If a reasonable agreement could be reached then European football could benefit but stakeholders need to be prepared to consider the requirements of the sport generally and not

just their own vested interests. The popularity of European football could reach even greater heights but the income that the potential additional popularity could provide would need to be divided carefully, wisely and fairly.

Solidarity payments would need to be considered prudently because they would be one means whereby some redress could be obtained by those directly or indirectly affected by the introduction of the proposed ESL. Currently, solidarity payments are set at 7% from UEFA's competition revenue but this percentage appears low and there are some suggestions that it should be increased to 20%. Perhaps the percentage should be even higher if the competition arrangements were considered from an ESL perspective. A figure in the region of 40% might be more appropriate bearing in mind the likely large financial success of the ESL and the deleterious effect it is likely to have on the other UEFA competitions and clubs. Note that there would be a limit to what the top 20 clubs would be prepared to concede by way of a solidarity payment percentage and this must be taken into consideration. Trying to push for a solidarity payment that is too high could prompt the top clubs to consider breaking away from UEFA and running the competition themselves. However, if the top 20 clubs could share 60% of the competition income and 40% was shared between the remaining clubs under UEFA's control, those top 20 clubs would remain in a very privileged position and maintain their financial edge over clubs not in the ESL.

In conclusion, it is likely that the proposed ESL would bring greater competitive balance to the main national leagues and it would be feasible to integrate it into UEFA's current competition structure. However, the national associations would be under pressure from their leagues to resist the change. The national associations themselves are also likely to have considerable concerns over making such profound alterations to the structure of European football, which may leave it in a weaker position in some countries than before the change. There may also be concerns over the potential gap that could widen between the clubs playing in the proposed ESL and other European football clubs. These concerns may encourage the national associations to view the proposed ESL as an unnecessary risk, preferring to continue with the current system that works relatively efficiently and effectively, albeit without strong competitive balance in some national leagues. Nevertheless, if support for the proposed ESL was forthcoming, it would be imperative that the revenue which the new competition would attract would not only benefit the participating clubs, but European football generally.

## 10.7 Luxury Tax Options

Having considered UEFA's options from the perspective of its competitions, it is also apposite to briefly return to the topic of luxury taxes as they do provide another possibility for UEFA to consider. The luxury tax was examined in Chapter 9 when consideration was given to the concept of a tax on clubs which exceed a set threshold for player wages. This option was rejected there as it did not provide as successful a solution to the issue of financial viability of European football clubs as the FFP Regulations. There were also problems with its ability to achieve competitive balance due to the large financial differential between the wealthy and the poorer European football clubs. However, a luxury tax is probably one of the fairer restraints as it does provide the clubs with a choice as to whether they pay the larger salaries and, therefore, incur the tax. Thus, it can be used as a means of raising revenue for solidarity payments provided it is accepted that, in the European football setting, it cannot provide the possibility of competitive balance.<sup>1468</sup> In the circumstances, it may be possible for UEFA to introduce a luxury tax on wages but to have it fixed at a level which would be acceptable to the wealthy clubs. Deciding on the threshold would not be an easy task, as the MLB has discovered, but it is an avenue which UEFA could usefully explore.

Another possible option would be a luxury tax on transfer fees. This could operate in a similar manner to the payment of stamp duty on the purchase of a house, which occurs in some countries, with a percentage of the transfer fee being paid to UEFA for solidarity purposes. This is not a new suggestion. In 2017, the Chinese Football Association introduced a 100% transfer fee on foreign players, requiring clubs to pay the agreed transfer fee and then pay an equal sum to the Chinese Development fund which goes towards grassroots football in China.<sup>1469</sup> More recently, FIFA's Stakeholders Committee 'proposed the introduction of a 1% levy on all transfer fees to support a fund to compensate clubs which develop players through their youth academies'.<sup>1470</sup> UEFA President Ceferin has also mentioned this possibility, stating that '[w]e do have to examine new mechanisms like luxury taxes and in particular

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<sup>1468</sup> If this were sought, the luxury tax threshold would need to be set so low that wealthy clubs and the better players would not accept the tax.

<sup>1469</sup> Cameron Wilson, 'Shocking rule changes see Chinese FA levy 100% tax on foreign player transfers, and increase under-23 player quotas', *Wild East Football* (Web Page, 25 May 2017) <<https://wildeastfootball.net/2017/05/shocking-rule-changes-see-chinese-fa-levy-100-tax-foreign-player-transfers-increase-23-player-quotas/>>.

<sup>1470</sup> Andrew Warshaw, 'FIFA transfer reforms target an end to player "hoarding" and mega-pay days for agents', *Inside World Football* (Web Page, 20 February 2020) <<http://www.insideworldfootball.com/2020/02/28/fifa-transfer-reforms-target-end-player-hoarding-mega-pay-days-agents/>>.

sporting criteria like squad limitations and fair transfer rules, to avoid player hoarding and excessive concentration of talent within a few teams'.<sup>1471</sup>

However, there are already rules in place for transfers in Europe, which commenced in 2001 following negotiations between FIFA and the European Commission. The Commission had opened an infringement procedure against FIFA in 1998 as a result of FIFA's failure to make appropriate changes to its transfer arrangements following the *Bosman*<sup>1472</sup> decision.<sup>1473</sup> It was subsequently agreed between the Commission and FIFA that a 5% levy would be imposed on transfers as a solidarity payment which was to be used to ensure that 'training clubs receive a part of the player's added value, as well as a compensation mechanism for training costs incurred by the player's club up to the age of 23 on the basis of real costs incurred'.<sup>1474</sup> As a result of this agreement, in July 2001, FIFA adopted an amended version of its Regulations on Status and Transfer of Players, which apply to international transfers.<sup>1475</sup> The levy is important for the training and development of young players,<sup>1476</sup> and it is crucial for the development and improvement of European football that this work continues and that clubs are compensated for their expense and efforts. It is also important to acknowledge the levy's existence because if a further tax in the area of transfers is to be considered it needs to be discussed with FIFA and the European Commission before it is implemented.

A luxury tax on transfers may be a reasonable and fair way to proceed, particularly when it is noted how the concept of a transfer has developed since the *Bosman* decision.<sup>1477</sup> A current transfer is effectively the buying out of a player's contract. In other words, there is a contract in place between a club and a player and it has been jointly determined between club and player that the player will join another club on the basis that the player's current club will receive a payment for releasing its contracted player to the player's new club. All parties to

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<sup>1471</sup> 'UEFA considers squad limits, transfer market changes', *Reuters* (Web Page, 22 March 2017) <<https://www.reuters.com/article/uk-soccer-uefa-ceferin/uefa-considers-squad-limits-transfer-market-changes-idUKKBN16T1QON>>. UEFA President Ceferin has also said, 'We do need to assess whether the transfer market as it operates today is the best we can do? We cannot be afraid to touch it.'

<sup>1472</sup> *Bosman* (n 81).

<sup>1473</sup> Jakub Laskowski, 'Solidarity compensation framework in football revisited' (2019) 18 *The International Sports Law Journal* 150, 155.

<sup>1474</sup> *Ibid* 156

<sup>1475</sup> *Ibid*.

<sup>1476</sup> Laskowski points out that the Regulations on Status and transfer of Players have experienced a number of issues in respect of their application and implementation, which has affected their effectiveness. See Jakub Laskowski, 'Solidarity compensation framework in football revisited' (2019) 18 *The International Sports Law Journal* 150, 155.

<sup>1477</sup> *Bosman* (n 81).



the transfer are, therefore, in favour of and benefit from it taking place. There is an advantage in the transfer from the perspectives of all parties. If one of the parties under the original contract does not agree to the transfer then the original contract continues until its end date.

Examples of clubs and players making these decisions are commonplace. Mesut Ozil's agent indicated in early 2020 that his player would remain at Arsenal until his contract expires, and continue to collect his weekly wage of £350,000.<sup>1478</sup> Similarly, Gareth Bale opted to stick with his contract with Real Madrid.<sup>1479</sup> On occasion, a club will take a similar view, holding a player to his contract. For instance, in April 2020, Arsenal decided it was in its interests to retain Pierre-Emerick Aubameyang for the final year of his contract rather than accept an unfavourably low transfer payment.<sup>1480</sup> In mid-2019, Chelsea took a different view with Eden Hazard, allowing him to move to Real Madrid for €100 million, despite 12 months remaining on his contract.<sup>1481</sup>

Transfers have become the means to terminate an existing contract between club and player. Both club and player need to agree to the transfer proceeding, with the purchasing club offering an acceptable sum to the vendor club and adequate contractual terms to the player. On this basis the agreement will have been reached through party choice. As an alternative approach, the parties could wait for the contract to end and the player would then be free to join the new club with no transfer fee payable. In essence, therefore, the transfer fee is a payment for the novation of the contract and because of its nature the transfer appears to be a reasonable process on which to impose a luxury tax and should, hopefully, be acceptable to stakeholders.

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<sup>1478</sup> Simon Collings, 'Mesut Ozil won't leave Arsenal before contract expires, confirms agent', *The Standard* (online at 28 February 2020) <<https://www.standard.co.uk/sport/football/transfer-news/arsenal-news-mesut-ozil-transfer-news-a4374541.html>>. Ozil did eventually transfer to Fenerbahce in January 2021, with his Arsenal contract due to expire in June 2021. See 'Mesut Ozil reflects on "amazing journey" after completing move away from Arsenal', *Sporting Life* (Web Page, 25 January 2021) <<https://www.sportinglife.com/football/news/ozils-fenerbahce-move-confirmed/188607>>. See also Rudi Schuller, 'New Fenerbahce signing Mesut Ozil leaves Arsenal "holding no grudges"', *DAZN News* (Web Page, 25 January 2021) <<https://www.dazn.com/en-ES/news/soccer/new-fenerbahce-signing-mesut-ozil-leaves-arsenal-holding-no-grudges/16xvsk0rkr88d1lv0gd3250jt9#>>.

<sup>1479</sup> Marco Ruiz, 'Bale to make club dig deep to offload him', *AS* (Web Page, 24 March 2020) <[https://en.as.com/en/2020/03/24/football/1585043211\\_018975.html](https://en.as.com/en/2020/03/24/football/1585043211_018975.html)>. Bale's contract runs until 2022 and he is paid €14.5 million per annum. Gareth Bale is currently on loan to Tottenham Hotspur.

<sup>1480</sup> Mark Brus, 'Losing Aubameyang on a free transfer might now be Arsenal's best option', *Just Arsenal* (Web Page, 29 April 2020) <<https://www.justarsenal.com/arsenal-transfer-news-aubameyang-should-stay-until-end-of-contract/243323>>. Aubameyang has recently entered into a new contract with Arsenal.

<sup>1481</sup> Matias Grez, 'Eden Hazard: Real Madrid and Chelsea agree Belgian international's transfer', *CNN* (Web Page, 7 June 2019) <<https://edition.cnn.com/2019/06/07/football/eden-hazard-transfer-real-madrid-chelsea-spt-intl/index.html>>.

The amount of the tax would be based on the price paid for the player. In recent years, there have been a reasonable number of fee-paying transfers, although it should be noted that the majority of transfers involve players who are out of contract.<sup>1482</sup> Nonetheless, in the 2019–20 season, the EPL spent over €1500 million on transfer fees, Spain and Italy spent over €1200 million each and Germany spent over €700 million.<sup>1483</sup> A 5% tax on these four amounts combined would produce a conservative solidarity payment of about €250 million and this is considering only four of the European national leagues (admittedly the biggest). Further, the figures stated do not include those transfers with an ‘undisclosed’ fee. It is also relevant that UEFA’s solidarity payment in 2016–17 amounted to only €268.3 million<sup>1484</sup> which indicates that a tax on transfer fees could provide a useful addition to UEFA’s solidarity fund.

Setting the rate of tax on transfers would need to be considered carefully and take into account the levy of 5% that is already being charged for the training and development of players. An escalating percentage rate could be adopted with 5% of transfer fees between 0 and €5 million, 7.5% of transfer fees between €5 million and €10 million, 12.5% of transfer fees between €10 million and €20 million, 15% of transfer fees between €20 million and €50 million, up to 20% of transfer fees above €50 million. This would provide a lower rate of tax for the cheaper transfers, which are more likely to involve smaller clubs, and higher rates would apply to the more expensive transfers, which are likely to involve the wealthy clubs that should be better placed financially to afford a larger tax. The tax would be payable by the purchasing club with the player not being able to be registered for his new club until the full amount of the tax has been paid. It would seem reasonable that the purchasing club pay the tax, as if the club can afford the player it should also be in a position to pay the tax.

From a legal perspective, it would be particularly important to liaise with the European Commission as there is a danger it could find transfer fees to be a breach of Articles 45 and 101 of the *TFEU*.<sup>1485</sup> In *Bosman*,<sup>1486</sup> the three legitimate aims pursued by the transfer system were identified as ‘protection of the integrity of competitions, competitive balance between football clubs, and protection of the training clubs and development of young players’.<sup>1487</sup> It

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<sup>1482</sup> Laskowski (n 1473) 165. Laskowski states, ‘[in] 2017, change of the club of registration by players who were out of contract accounted for 65.5% of all international transfers, while only 13% of transfers accounted for a permanent transfer of the player’s registration rights between two clubs’.

<sup>1483</sup> ‘Soccer Transfer News Live!’, *SoccerNews* (Web Page, 24 April 2020) <<https://www.soccernews.com/>>.

<sup>1484</sup> Laskowski (n 1473) 159.

<sup>1485</sup> *Ibid* 154.

<sup>1486</sup> *Bosman* (n 81).

<sup>1487</sup> Laskowski (n 1473) 153.

is, therefore, probable that the proposed tax would meet the approval of the European Commission (and the ECJ if the matter reached that body) because the money obtained from the tax is being used purely as a solidarity payment to provide assistance to clubs at the lower and grass roots levels of European football.

There are other possibilities to consider either as alternatives to a transfer tax, or as additional measures to support the tax. Prevention of the hoarding of players is one such area that could be examined. UEFA President Ceferin has said that ‘action needs to be taken to stamp out competitive inequality that results from the region’s elite clubs building up rosters overflowing with the game’s top talent’. Marcotti suggests that this problem could perhaps be addressed by cutting squad sizes from the standard number of 25 to 19, which would provide opportunities for some players to move to other clubs. He maintains that this could assist competitive balance as well as assist younger players, who ‘would become more valuable and clubs would be incentivised to develop them and keep them around because they don’t count against the cap’.<sup>1488</sup> There is merit in Marcotti’s suggestion but reducing squad sizes significantly when clubs are expected to play in so many different competitions does risk injuries to players and could reduce the standard of football due to club managers having fewer options with a reduced squad. For these reasons perhaps reducing the squad size to 21 may be a more feasible solution.

Another possible approach would be to set a total number of players that a club can employ, with penalties for any club that exceeds the fixed number. Care would need to be taken in fixing the number as it would be sensible to have a separate category for young players, which could be separately capped. It is important for the game that clubs are able to develop young footballers. Consideration would also need to be given to having a penalty free period once any new rule in this area is introduced, to give the clubs an appropriate period to reduce their playing numbers as they may have players with longer term contracts.

The loaning of players from one club to another also needs to be considered when examining the hoarding of players. Ahmed and Burn-Murdoch noted that in 1992, ‘loans made up 6% of all transfers in Europe’s so-called “Big Five” leagues: England, Spain, Italy, Germany and France. A decade ago, loan deals rose to 20 per cent of all transfers. This year [2019], the

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<sup>1488</sup> Gabriele Marcotti, ‘Soccer continues to favor superclubs. If we can’t redistribute wealth, why not the players?’, *ESPN* (Web Page, 18 January 2020) <<https://www.espn.com.au/football/blog-marcottis-musings/story/4034665/soccer-continues-to-favor-superclubs-if-we-cant-redistribute-wealthwhy-not-the-players>>.

number has risen further to 29 per cent.<sup>1489</sup> The rise in the number of loans has caused FIFA to act and its Stakeholders Committee has suggested that non-domestic loans ‘among players aged 22 and over be limited to eight out and eight in’.<sup>1490</sup> A tightening of the number of players a club can employ without penalty might lead to a reduction in the number of loans but perhaps a tax on loaned players could also be considered. A reasonable figure to put forward for this tax could be 10% per cent of the loaned player’s wage. This percentage is unlikely to be too punitive to prevent the loan from taking place and would provide useful additional solidarity funding. However, exemptions for young players should possibly be considered given that a loan may give them a better chance to obtain actual playing experience.

The use of a luxury tax or financial penalty in the areas of player transfers, and the hoarding and loaning of players might limit excesses in these areas and could possibly assist in providing additional competitive balance but this would not be its main purpose. Its chief aim would be to redistribute some of the wealth from the larger clubs and provide assistance to the lower levels of European football.

The requirement for consensus among the stakeholders if any such changes were to be considered needs to be reiterated. It is important for UEFA to adopt a similar approach as it did with the introduction of the FFP Regulations and consult and discuss options with stakeholders. There is an element of choice in relation to luxury tax options which would hopefully assist in gaining stakeholder support. A luxury tax on transfers, for instance, provides the club with a choice as to whether to buy the player and pay the tax or forego the transfer. Nonetheless, consensus is crucial as UEFA needs the support of the elite clubs to have the best chance of meeting its aims of looking after the interests of European football.

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<sup>1489</sup> Murad Ahmed and John Burn-Murdoch, ‘How player loans are reshaping European football’s transfer market’, *Financial Times* (online at 31 August 2020) <<https://www.ft.com/content/9bd82b30-caf2-11e9-a1f4-3669401ba76f>>. The percentage of loan transactions in relation to overall transfers has generally continued to increase for the 2019–20 season with Italy (Serie A) at 45%, Spain (La Liga) at 36%, Germany (Bundesliga) at 29% and England (EPL) at 24%. See ‘Soccer Transfer News Live!’, *SoccerNews* (Web Page, 24 April 2020) <<https://www.soccernews.com/>>.

<sup>1490</sup> Warsaw (n 1470) 1. The Stakeholders Committee has the figure of eight dropping progressively to six by 2022–23 season. The number of players that can be loaned between the same two clubs would be capped at three.

## 10.8 Conclusion

The question of how UEFA should deal with the competitive balance issue is a difficult one, particularly as there is an argument that it is not necessarily required in the specific setting of European football. Ceferin has acknowledged the problems that it poses and appreciates that bringing the clubs to a similar level is not feasible.<sup>1491</sup> Any financial restraints aimed at securing competitive balance would need to be punitive on the wealthy clubs and it is extremely doubtful that they, and also the better players, would be prepared to accept them. Consent among stakeholders remains crucial to UEFA.

However, UEFA does need to act. Some attempt should be made to assist the lower-tier clubs to at least compete with the wealthy ones. Assistance can be given in the areas of opportunity and finance. Opportunity can be provided by UEFA increasing the number of clubs competing in its competitions. This could happen by letting more clubs play in its current competitions (including UEL2 starting in 2021) or alternatively start a new UEL3 competition.

From a financial perspective, UEFA should seek to increase its solidarity payment share from the current 7% to a figure in the region of 20–25%. This would provide a larger share of income for redistribution to the smaller clubs and grass-roots football, which would benefit European football generally and, for this reason, it should be acceptable to the wealthy clubs which would not be hugely impacted by the redistribution.<sup>1492</sup>

UEFA should also examine the possibilities of imposing a luxury tax on player wages together with taxes in the areas of player transfers and loans. It should also consider the reduction in size of playing squads and the number of players contracted to any club at one time. These options are unlikely to have a major effect on competitive balance but they may prevent the differential between clubs from increasing significantly. These measures would also provide potential additional income for the solidarity fund. With careful management and the full involvement of stakeholders it should be possible to devise and agree on an acceptable way forward.

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<sup>1491</sup> Marcotti (n 1488) 1. Ceferin has said that ‘the concentration of wealth among a small group of clubs threatens the competitive balance that is essential to football’s appeal’. He continued to say that ‘I think it’s one of the biggest challenges we have ahead of us. I don’t think we can [close] the gap or bring all of the clubs [on the same level, that would be a very naïve way of thinking.’ He also stressed the need for urgent action and a response ‘before it is too late’.

<sup>1492</sup> The main revenue streams for wealthy clubs are broadcasting payments, sponsorship arrangements and merchandise sales.

Furthermore, UEFA should consider the ESL proposal. It would provide a major change and could be organised relatively easily as well as provide greater competitive balance in the five main European national leagues. However, an ESL should only be adopted if there is a broad consensus amongst stakeholders and there is a sufficiently large solidarity payment from ESL competition income to ensure the protection of European football at its lower and grass root levels.

# CHAPTER 11: THE EFFECT OF THE COVID-19 PANDEMIC AND UNFORESEEN DISRUPTIONS ON THE FINANCIAL FAIR PLAY (FFP) REGULATIONS

## *11.1 Introduction*

This chapter will answer the fifth thesis question: What is the effect and ramifications of unforeseen disruptions (such as the COVID-19 pandemic) on the FFP Regulations and on European football generally? It is an additional chapter to cover the advent of the COVID-19 pandemic. The effects of the pandemic have already been too great for this event to be ignored and its impact on the FFP Regulations is obvious. One of the first moves UEFA undertook in dealing with the pandemic was to suspend the operation of the FFP Regulations during 2020. It may become necessary for UEFA to make further changes once the effects of the pandemic become more apparent.

This chapter will also assess UEFA's response to the pandemic and will consider how it should handle the pandemic into the future. These considerations will be measured, acknowledging that the full extent and effects of the COVID-19 pandemic are still to unfold.

The chapter will also examine the threat of other unforeseen disruptions on the FFP Regulations and the operation of UEFA's competitions. Those competitions are vital to UEFA's income and financial existence and the clubs also need income to meet the breakeven provision in the FFP Regulations and to remain financially viable. The COVID-19 pandemic raises the importance of trying to consider possible unforeseen disruptions before they occur with the aim of preparing a basic contingency plan to deal with a disruption should it happen. With this in mind, a brief and elementary examination of the effects of the disruptions of war, terrorism and climate change will also be undertaken.

## *11.2 Unforeseen Disruptions*

The FFP Regulations were drafted with known variables in mind. In light of the experience of 2020, what has to be considered now is the possible impact of disruptions that were unforeseen when the FFP Regulations were drafted. Unforeseen disruptions are by their nature difficult to predict or ascertain but the most likely causes for such disruptions to UEFA and European football are war, terrorism, weather and climate events, and pandemics. They are

all matters which were not taken into account when the FFP Regulations were being considered because they are not controllable by organisations like UEFA.

There appear to be two main areas to consider when preparing for unforeseen disruptions. The first is a contingency plan and the second is how to deal with the disruption should it occur. Naturally, there will be an overlap between these two as a basic program of how to deal with any disruption would have been devised in the planning stage. This may need to be reconfigured to deal with the actual disruption itself as a particular disruption may not occur in the exact manner originally envisaged.

Planning for an unforeseen disruption is to some extent paradoxical as it is not possible, *prima facie*, to plan for an event which is unforeseen. Nonetheless, careful contingency planning ‘can mitigate the impacts of disruption’<sup>1493</sup> and also assist in allowing the business operation ‘to continue to function or to return to normal more quickly’<sup>1494</sup> after an unforeseen disruption has happened. The development of a business continuity plan<sup>1495</sup> would form the basis of the planning. It would include a business impact analysis, a risk assessment and a series of plans including ones relating to emergency response, communications and return to normal operations.<sup>1496</sup>

Once a plan has been developed, organisations then need to deal with implementation when an actual disruption occurs. A number of steps would need to be taken quickly and decisively, and, if an organisation has planned for such an occurrence, it should be in a strong position to act with authority and apparent control. Safety of the people employed by the organisation and its stakeholders needs to be the first consideration. When this has been achieved it is important to restore business operations as soon as practically possible but subject to that overriding concern for safety. It is also essential to form a body of experienced personnel to deal exclusively with matters arising out of the unforeseen disruption. This body needs to be adaptable and flexible, closely following developments so it can deal with immediate and pressing issues as well as those that evolve over a longer period of time. Once the disruption

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<sup>1493</sup> Maureen Roskoski and Stephen Clawson, ‘The five things you need to know about business resilience planning’, *FMLink* (Web Page, February 2017) 5 <<https://fmlink.com/articles/five-things-need-know-business-resilience-planning/>>.

<sup>1494</sup> *Ibid.*

<sup>1495</sup> Maureen Roskoski and Stephen Clawson, ‘Operationalizing resilience in facilities’, *FMLink* (Web Page, May 2017) 2–4 <<https://fmlink.com/articles/operationalizing-resilience-facilities/>>.

<sup>1496</sup> Roskoski and Clawson (n 1493) 4.



has been brought under control it would then be necessary to assess the damage caused and put in place plans to address outstanding problems.

### 11.3 War

War, depending on the countries involved, its severity, its duration and its impact internationally, could be particularly disruptive for European football. The more individual countries involved in a war, the greater the disruption, but even a war between only two countries or a civil war involving only one country could impact heavily on European football. For example, the Spanish Civil War saw the cancellation of La Liga competitions from 1936 to 1939.<sup>1497</sup> It only affected Spain at that time because competition between clubs in different countries did not commence until the 1950s when air travel became more available. If a similar situation were to occur now, there could be some disruption to UEFA's competitions with clubs from the affected country possibly being unable to meet their competition commitments.

The two major wars in the 20<sup>th</sup> century had a major impact on football competitions being played, although the effects were national rather than European in nature. During the First World War, the most prominent football competition in Europe was the EFL, which was suspended from 1915 to 1919.<sup>1498</sup> In Germany, although some football was played 'it was completely in tatters', with the German football championship for the Viktoria Cup halted between 1914 and 1918.<sup>1499</sup> French football was also badly disrupted with the major part of the war being conducted on French soil.<sup>1500</sup>

The Second World War also had an effect on European football, which had grown significantly in popularity within European countries since the First World War.<sup>1501</sup> However,

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<sup>1497</sup> 'Spanish La Liga', *FootballHistory.org* (Web Page, viewed 6 January 2021) <<https://www.footballhistory.org/league/la-liga.html>>.

<sup>1498</sup> John Simkin, 'Football and the First World War', *Spartacus Educational* (Web Page, September 1997) <[www.spartacus-educational.com/FWWfootball.htm](http://www.spartacus-educational.com/FWWfootball.htm)>.

<sup>1499</sup> Ulrich Hesse, *Tor!: The Story of German Football* (WSC Books, 2003) 40. Hesse also states that '[t]he Kaiser even issued an edict saying that all public open space should be used to grow potatoes. Now the football clubs had neither players nor pitches.'

<sup>1500</sup> Nick Roche, 'Football in France and the Significance of World War 1', *WorldSoccer* (Blog Post, 6 December 2014) <<https://www.worldsoccer.com/blogs/football-france-significance-world-war-1-358236>>. Surprisingly, perhaps, the popularity of football in France did increase during WWI with British troops encouraging interest as they fought alongside each other in the trenches. On a more sombre note, an equally important impact of the First World War was the long-term effect the loss of so many male lives had on the future of European football. France, for instance, lost 1,393,000 men, which was 'almost double the number of British troops, and six times more than the number of French troops who died in World War II'.

<sup>1501</sup> John Simkin, 'Football and the Second World War', *Spartacus Educational* (Web Page, September 1997) <[www.spartacus-educational.com/2WWfootball.htm](http://www.spartacus-educational.com/2WWfootball.htm)>.

that effect appeared to be less severe with the Gauligas in Germany continuing up to 1944 and Serie A in Italy continuing until 1943. La Liga continued unaffected, but this was not surprising as Spain remained neutral during the war. In England, however, the EPL was suspended from 1939 to 1946.<sup>1502</sup>

Although there have been no major wars in Europe since the Second World War ended in 1945, there have been several smaller wars over the last 30 years. These have generally involved countries formed following the dissolutions of Yugoslavia and the USSR. UEFA has managed to avoid any major disruption due to war, but it has not achieved this by keeping politics out of football. There are currently six national matches that UEFA has on a prohibited list due to ongoing political or military disputes between the countries involved. These are ‘Ukraine against Russia (since 2014), Kosovo against Serbia (since 2016), against Bosnia-Herzegovina (since 2016) and against Russia (since 2019), Armenia against Azerbaijan (since 2010) and Spain against Gibraltar (since 2013)’.<sup>1503</sup> This means that these countries will not play against each other in UEFA-run competitions. The decision as to whether a national clash becomes prohibited is determined by the UEFA Executive Board or, if a quick decision is required, by the UEFA Emergency Panel led by the UEFA President.<sup>1504</sup>

UEFA has been able to avoid a major disruption due to war because it has only had isolated situations to deal with. If, however, it was faced by a war involving a larger number of its member countries then its ability to keep European football going might prove difficult. There are two main points to consider. First, UEFA needs its competitions to take place as these provide it with its income to function and carry out its role. Secondly, clubs need to meet the breakeven requirement of the FFP Regulations, so they also need the competitions to continue.

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<sup>1502</sup> Ibid. Even in England, the passion for football could not be dampened by war and friendly and regional games took the place of the organised football competitions. In May 1940, a game between Chelsea and West Ham drew a crowd of 32,797 in London, while the evacuation of Dunkirk was being undertaken. See Simon Kuper, ‘English football during World War II showed how sport can heal and unify during times of crisis’, *ESPN* (Web Page, 12 May 2020) <<https://www.espn.com.au/football/english-premier-league/story/4092879/english-football-during-world-war-ii-showed-how-sport-can-heal-and-unify-during-times-of-crisis>>.

<sup>1503</sup> Stefan Nestler, ‘EURO 2020: Why Serbia can’t face Kosovo – and UEFA’s other forbidden matchups’, *DW* (Web Page, 20 November 2019) <<https://www.dw.com/en/euro-2020-why-serbia-cant-face-kosovo-and-uefas-other-forbidden-matchups/a-51338370>>.

<sup>1504</sup> Ibid 3. Whilst UEFA’s decisions on blacklisted matches are easy to organise in the early rounds of a competition, a problem can arise in the knockout rounds as it nearly did ‘in the 2014–15 Europa League when two Ukrainian clubs (Dnipro and Dynamo Kiev) and Russian club Zenit St. Petersburg (‘Zenit’) made the quarterfinals’. If all three sides had made the semi-finals, no draw would have taken place with the two Ukrainian sides playing each other and Zenit playing the other semi-final team. It’s not clear what would have occurred if Zenit and one of the Ukrainian sides had made the final. However, that did not materialise, with Zenit and Dynamo Kiev losing in the quarter-finals.

They require their competition prize money and also broadcasting revenue and gate receipts to assist them meet the FFP Regulations but also to remain financially viable. Obviously, UEFA can suspend the FFP Regulations but this would provide only temporary relief. Clubs need football to take place under usual conditions if they are to survive in the long term. It is, therefore, crucial that any break in continuity is either prevented or kept to a minimum period. Further, it would be sensible for the competitions to continue wherever possible even if it means a country or countries have to be temporarily excluded from the competitions because they are impacted by war. In these types of situation a contingency plan is vital.

A contingency plan could include arrangements to have matches take place at venues away from the war zone in the same way that UEFA organised their 2020 competition finals to be played in Lisbon and Westphalia. It could also cater for the removal of clubs in war zones from UEFA's competitions if those clubs could not find alternative venues in which to host their fixtures. The plan could also have a provision to consider a club's ability to participate before each competition is commenced. If war appeared imminent, the club at risk could be assessed as to its ability to conduct its matches from an alternative safe stadium. If a different venue could not be established then the club should be omitted from the upcoming competition. The competition needs to function as close to normal as possible to retain its integrity among stakeholders and the general public. It does not want clubs dropping out of a competition whilst it is in progress, if at all possible. A contingency plan of this nature would provide UEFA with its best opportunity of securing its competitions if an outbreak of war was to occur.

#### *11.4 Terrorism*

Terrorism, like war, could create disruption depending on its intensity and frequency. It might be a one-off random attack, an assault against a particular organisation or it might involve only one country with the terrorism directed against a particular national government. On the other hand, it could involve a threat to all member countries. Terrorism has been linked with sport since the Munich Olympics in 1972 when members of the Palestinian terrorist group, Black September, killed two athletes from the Israeli Olympic team whilst taking nine others hostage before killing them.<sup>1505</sup> Events, in general, where large numbers of people congregate

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<sup>1505</sup> Simon Reeve, 'Olympics Massacre: Munich – The Real Story', *The Independent* (online at 22 January 2006) <<https://www.independent.co.uk/news/world/europe/olympics-massacre-munich-real-story-5336955.html>>. There were 168 sports-related terrorist attacks between 1972 and 2004. See Kristine Toohey, 'Terrorism, sport and public policy in the risk society' (2008) 11(4) *Sport in Society* 429.

can be targets for terrorists with the Ariana Grande concert at the Manchester Arena on 22 May 2017 being a recent example.<sup>1506</sup> Football matches with many spectators in a confined area provide potential targets for terrorist attacks. For instance, a triple suicide bombing occurred outside the Stade de France in Paris on 14 November 2015, while an international match between France and Germany was taking place. Tight security measures prevented the terrorists from entering the stadium and potentially causing many deaths. As a result only one unfortunate shuttle bus driver and the three bombers were killed.<sup>1507</sup>

UEFA's response to unforeseen disruptions relating to terrorism appears to involve 'taking a proactive role in generating dialogue, sharing best practices and discussing measures to counter the danger'.<sup>1508</sup> UEFA organised a masterclass in April 2018 in Munich where 150 delegates from 40 national associations joined with international experts to discuss terrorism.<sup>1509</sup> The aim 'was to help show how to protect people against an attack, and was addressed through four themes: the reality of terrorism; the way terrorists operate; how to respond to the threat; and best practices'.<sup>1510</sup> It was stressed at the meeting that '[c]ounter-terrorism work was no stand-alone activity – but had to be integrated within a balanced approach to safety, security and service'.<sup>1511</sup>

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<sup>1506</sup> Rory Smith and Sewell Chan, 'Ariana Grande Manchester Concert Ends in Explosion, Panic and Death', *The New York Times* (online at 22 May 2017) <<https://www.nytimes.com/2017/05/22/world/europe/ariana-grande-manchester-police.html>>. An Islamist extremist suicide bomber detonated a homemade bomb in the foyer of the Manchester Arena toward the end of the concert, killing 23 people.

<sup>1507</sup> David Conn, 'Dortmund attack: How soccer has become a target of terrorists', *The Irish Times* (online at 12 April 2017) <<https://www.irishtimes.com/sport/soccer/champions-league/dortmund-attack-how-soccer-has-became-a-target-of-terrorists-1.3046763>>. Other examples include the Borussia Dortmund team bus being attacked with roadside bombs on its journey to the Westfalenstadion to play in a UEFA Champions League match against Monaco on 11 April 2017, and the attack at the Vodafone Arena in Istanbul on 10 December 2016 when 31 police officers and seven others were killed after the match between Besiktas and Bursaspor. In 2009, an attack on the Sri Lankan cricket team travelling by coach to the Gaddafi stadium in Lahore to play a test match against Pakistan resulted in six members of the Sri Lankan cricket team being injured and six policemen and two bystanders killed. See 'Sri Lankan cricketers injured as gunmen attack team bus', *The Guardian* (online at 3 March 2009) <<https://www.theguardian.com/sport/2009/mar/03/sri-lanka-cricket-terrorist-attack-pakistan#>>.

<sup>1508</sup> UEFA, 'Counter-terrorism focus at UEFA seminar', *UEFA.com* (Web Page, 20 April 2018) <<https://www.uefa.com/insideuefa/protecting-the-game/news/0244-0f8e5f8b0db5-8b866cc1ddbf-1000--counter-terrorism-focus-at-uefa-seminar/>>.

<sup>1509</sup> *Ibid.*

<sup>1510</sup> *Ibid.* Interestingly, 16 of the countries present at the masterclass had suffered a terrorist attack in 2016–17, which merely confirmed that terrorism was a shared problem across Europe.

<sup>1511</sup> *Ibid.*

Further examples of UEFA's work in the areas of safety and security include the 'Train the Trainer' scheme.<sup>1512</sup> So far 'more than 600 trainers trained over 70,000 stewards.'<sup>1513</sup> UEFA has carried out Masterclasses on contemporary topics and training programmes for individual national associations.<sup>1514</sup> During 2018–19, ten such events were staged in seven countries.<sup>1515</sup> Work has also continued on security preparation for EURO 2020 (now taking place in 2021 due to the COVID-19 pandemic) with the host stadiums being given particular assistance to ensure maximum safety for all persons attending the competition.<sup>1516</sup>

More generally, UEFA's mission in respect of stadium and security strategy and development is 'to promote, enhance and safeguard UEFA's corporate stadium and security policies, strategies and expertise, and to develop the national associations' capability to implement integrated stadium and security strategies'.<sup>1517</sup> To achieve this UEFA, *inter alia*, runs 'joint training programmes',<sup>1518</sup> hosts 'an annual pan-European stadium and security conference',<sup>1519</sup> offers 'strategy, policy and practical support to individual national associations',<sup>1520</sup> and develops, maintains and disseminates 'knowledge products, training programmes, and support services to all 55 national associations'.<sup>1521</sup>

UEFA's approach to the threat of terrorism seems to be practical and realistic. It has acknowledged the potential risk and has assisted clubs to prepare their personnel and stadiums for unforeseen events in this area. It has accepted its role as the leader of European football and provides up-to-date information on terrorism and security matters to its national associations and assists them in implementing necessary strategies to ensure as safe an environment as possible for stakeholders attending European football matches.

However, UEFA's efforts in respect of terrorism, although laudable, are not sufficient. UEFA requires its income from its competitions to operate effectively and the clubs must meet the

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<sup>1512</sup> UEFA, 'Security', *UEFA.com* (Web Page, viewed 6 January 2021) <<https://www.uefa.com/insideuefa/protecting-the-game/security/>>.

<sup>1513</sup> *Ibid.*

<sup>1514</sup> *Ibid.*

<sup>1515</sup> *Ibid.*

<sup>1516</sup> *Ibid.*

<sup>1517</sup> UEFA, 'Respect: UEFA Football and Social Responsibility Report 2018–19', *UEFA.com* <[https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/64/11/33/26411\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/64/11/33/26411_DOWNLOAD.pdf)>.

<sup>1518</sup> *Ibid.*

<sup>1519</sup> *Ibid.*

<sup>1520</sup> *Ibid.*

<sup>1521</sup> *Ibid.*

FFP Regulations requirements. UEFA needs to develop a contingency plan to protect its competitions from terrorism along the same lines as was discussed for war.

Terrorism attacks have generally been sporadic so it is likely that its effect on UEFA's competitions would be less than in the case of a war. Terrorism is also an occurrence which the clubs can take more direct action to prevent than war by ensuring their grounds are protected by the best security available. These factors need to be taken into account in the contingency plan. UEFA should also ensure clubs meet appropriate and up-to-date terrorism security standards. Such standards should be added to the infrastructure criteria which clubs are required to meet to obtain their licences to compete in UEFA's competitions. The contingency plan and licensing requirements should be updated regularly, following consultation with national and international law enforcement agencies and other government anti-terrorism bodies, to ensure that clubs competing in UEFA's competitions always utilise the best terrorism protection possible. Improvements in the area of terrorism prevention are constantly being developed and the clubs should be provided with up-to-date information and be made to use the most up-to-date technology available.

### *11.5 Climate Change and Severe Weather Events*

Climate change can be an emotive topic and it is difficult to provide accurate forecasts as to its likely effects in the future. Estimates seem to suggest that an increase in temperature of between three to five degrees centigrade could occur by 2100,<sup>1522</sup> with sea levels rising by 1.3 metres if a 3.5 degree centigrade increase in temperature were to take place.<sup>1523</sup> Global warming is also likely to cause more extreme weather events including flooding.<sup>1524</sup>

The effects of these changes on European football and sport generally is unknown. Journalist and commentator, David Goldblatt, has put forward some unproven predictions.<sup>1525</sup> The predictions seem, prima facie, alarmist but they are worth mentioning because they are the only information available on potential direct impacts on European football. He maintains that in England, 23 of the 92 league grounds can expect partial or total annual flooding of

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<sup>1522</sup> 'Global temperatures on track for 3-5 degree rise by 2100: UN', *Reuters* (Web Page, 29 November 2018) <<https://www.reuters.com/article/us-climate-change-un-idUSKCN1NY186>>.

<sup>1523</sup> Marlowe Hood, 'Latest Estimates in Sea Level Rises by 2100 are worse than we thought', *ScienceAlert* (Web Page, 11 May 2020) <<https://www.sciencealert.com/oceans-are-on-their-way-to-rising-over-a-meter-as-soon-as-2100#>>.

<sup>1524</sup> The Climate Reality Project, 'How the climate crisis threatens the future of sports', *BBC* (Web Page, 8 September 2020) <<https://www.bbc.com/news/science-environment-53111881>>.

<sup>1525</sup> *Ibid.*

their stadiums by 2050.<sup>1526</sup> The EPL grounds that Goldblatt deems to be most at risk include ‘Southampton’s St Marys, Chelsea’s Stamford Bridge and West Ham’s Olympic Stadium’.<sup>1527</sup> The Championship grounds he names to be at risk include Hull City and Cardiff City ‘which will both be entirely under water by 2050’<sup>1528</sup> while Division 2 club Grimsby Town’s Blundell Park ground ‘will sit beneath the North Sea’.<sup>1529</sup> Goldblatt also states that ‘football is going to feel the impact of the climate emergency very soon. More very hot weather is going to be a problem for spectators and players alike’.<sup>1530</sup>

If true, Goldblatt’s predictions are concerning and, in any event, indicate that sporting organisations, such as UEFA, need to take the issue of climate change seriously. However, the situation also needs to be kept in perspective. On Goldblatt’s own predictions only a small number of clubs are going to be affected by serious flooding and an increase in temperature of between three to five degrees centigrade could probably be managed in many cases by playing matches in the evening which is normally a cooler part of the day.

Nevertheless, it is important that UEFA as the leader of European football take a proactive stance towards climate change. It should not only be making its stakeholders aware of the potential gravity of the situation, but also encouraging positive action in areas such as reducing carbon emissions.

The evidence suggests that UEFA is responding to climate change in a purposeful manner. This can be seen in the way it has approached its EURO competitions in 2016 and 2021. For the 2016 event, UEFA prepared a social responsibility and sustainability report and focussed on areas including public transport and mobility, waste management, energy and water optimisation, and sourcing of products and services.<sup>1531</sup> It also set up a campaign and app that allowed spectators to offset their own carbon emissions when attending the tournament.<sup>1532</sup>

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<sup>1526</sup> Matt McGrath, ‘Climate Change: Sport heading for a fall as temperatures rise’, *BBC* (Web Page, 20 June 2020) 3 <<https://www.bbc.com/news/science-environment-53111881>>.

<sup>1527</sup> David Goldblatt, ‘Playing Against the Clock: Global Sport, the Climate Emergency and the Case for Rapid Change’, *Rapid Transition Alliance* (Web Page, 20 June 2020) 9 <<https://www.rapidtransition.org/resources/playing-against-the-clock/>>.

<sup>1528</sup> *Ibid.*

<sup>1529</sup> *Ibid.*

<sup>1530</sup> David Goldblatt, ‘The climate crisis is hitting football but the global game has time to take action’, *The Guardian* (online at 21 August 2020) <<https://www.theguardian.com/commentisfree/2020/aug/21/climate-crisis-football-global-game-carbon-neutral>>.

<sup>1531</sup> UEFA, ‘EURO 2016: Social Responsibility and Sustainability Report One-year-to-go report’, *UEFA.com* (Web Page, 2015) <[https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/26/41/78/2264178\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/26/41/78/2264178_DOWNLOAD.pdf)>.

<sup>1532</sup> UEFA, ‘UEFA launch EURO 2016 eco-calendar’, *Sportanddev.org* (Web Page, 26 August 2015) <<https://www.sportanddev.org/en/article/news/uefa-launch-euro-2016-eco-calculator>>.

In addition, UEFA produced an eco-calculator to estimate the environmental impact of their travel to the event and attendees were encouraged to support the Prony and Kafeate Wind Project.<sup>1533</sup> Unfortunately the uptake of the campaign and app was not high.<sup>1534</sup>

For EURO 2021, following the failure of its 2016 carbon emissions campaign UEFA agreed to ‘invest in gold standard renewable energy projects in partnership with South Pole to offset the estimated 405,000 tonnes of carbon produced by fans and UEFA staff travelling to games in the tournament’.<sup>1535</sup> It has also agreed to plant 50,000 trees in each of the 12 host countries to tackle the climate change issues surrounding the competition.<sup>1536</sup>

UEFA’s actions towards climate change extend beyond its EURO competitions. In conjunction with World Wild Fund for Nature it has produced a report showing how sport can contribute to sustainability and tackle climate change.<sup>1537</sup> The report ‘highlights good practices in sustainable sports to emphasise the commitment made by many sports to local communities and the planet’.<sup>1538</sup> It also stresses that sport has ‘unique power to raise awareness and promote sustainability to fans in Europe and beyond’.<sup>1539</sup> UEFA has also joined the Sports for Climate Action Framework which aims ‘to gather sports organisations, teams, athletes and fans together ‘to create a concerted effort to raise awareness of the need to meet the goals set out in the Paris Agreement for climate protection’.<sup>1540</sup>

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<sup>1533</sup> Ibid. The wind farms are in New Caledonia. See ‘Prony and Kafeate Windfarms, New Caledonia’, *Gold Standard* (Web Page, viewed 7 January 2021) <<https://www.goldstandard.org/projects/prony-and-kafeate-windfarms-new-caledonia>>. The Pacific Islands, being low-lying, are particularly vulnerable to climate change.

<sup>1534</sup> Goldblatt (n 1527) 18.

<sup>1535</sup> UEFA, ‘UEFA announces climate action for EURO 2020’, *UEFA.com* (Web Page, 24 September 2019) <<https://www.uefa.com/insideuefa/social-responsibility/news/0255-0f8e700075c4-61482c5c5c8b-1000--uefa-announces-climate-action-for-euro-2020>>. South Pole is a Swiss carbon finance consultancy founded in 2006 in Zurich. One of the projects UEFA is investing in provides efficient cooking stoves to rural areas in Rwanda with the aim of reducing the burning of fossil fuels (wood or charcoal). See UEFA, ‘UEFA’s pledge towards an environmentally conscious UEFA EURO 2020’, *UEFA.com* (Web Page, 27 November 2019) <<https://www.uefa.com/insideuefa/about-uefa/news/0257-0f8e727c349e-86a76bb607b1-1000--uefa-s-pledge-towards-an-environmentally-conscious-uefa-euro-20/>>.

<sup>1536</sup> Ibid.

<sup>1537</sup> UEFA, ‘Playing for our Planet: How sports win from being sustainable’, *UEFA.com* (Web Page, May 2018) <[https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/55/63/72/25563\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/uefaorg/General/02/55/63/72/25563_DOWNLOAD.pdf)>.

<sup>1538</sup> UEFA, ‘Playing for our Planet: How sports win from being sustainable’, *Sportanddev.org* (Web Page, 8 May 2018) <<https://www.sportanddev.org/en/document/manuals-and-tools/playing-our-planet-how-sports-win-being-sustainable>>.

<sup>1539</sup> Ibid.

<sup>1540</sup> UEFA, ‘UEFA’s pledge towards an environmentally conscious UEFA EURO 2020’, *UEFA.com* (Web Page, 27 November 2019) <<https://www.uefa.com/insideuefa/about-uefa/news/0257-0f8e727c349e-86a76bb607b1-1000--uefa-s-pledge-towards-an-environmentally-conscious-uefa-euro-20/>>.



UEFA's views on climate change and its effects appear sensible and pragmatic. It acknowledges that there is a problem and has in its organisation of its EURO competitions shown a willingness to address the issue of carbon emissions. As the leader of European football it not only leads by example but advocates and supports the need for climate change action by those involved in sport. However, this alone is not sufficient. As with war and terrorism, UEFA needs to develop a contingency plan.

A well-developed contingency plan can be effective because climate change is much slower to occur than war and terrorism and it should, therefore, be feasible to prepare for problems and mitigate them before they actually happen. The potential areas of concern appear to be flooding and rising temperatures. UEFA should ensure that clubs seeking a licence to play in its competitions provide expert reports in these areas setting out whether the club's stadium is at risk from either of these possibilities. If clubs are at risk they should be required to provide a plan to show how they are going to mitigate the risk. UEFA, for its part, would be advised to provide minimum standards which clubs are expected to meet in these areas.

As already discussed, playing matches at cooler times of the day or in the evening may be part of the answer, although those clubs with larger funding available may be able to consider installing cooling systems or perhaps even retractable roofing, as Wimbledon has introduced to its two main tennis courts.<sup>1541</sup> Flooding of grounds is likely to affect only a small number of clubs whose grounds are situated in low-lying areas. The degree of flooding would also be variable. Some clubs may be able to carry out works which eliminate or reduce the risk of flooding. If this is not possible then moving grounds may be an option or, perhaps ground-sharing might be more feasible. Whatever steps are ultimately taken, the critical aspect is that the risks be identified and plans be put in place to address them.

### *11.5 Pandemics*

Pandemics are another example of an unforeseen disruption and European football experienced an early example of this with the Spanish flu pandemic. Commencing in early 1918 and continuing through to April 1920, it comprised four successive waves with the

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<sup>1541</sup> Tim Newcomb, 'New No 1 Court Roof Among Stadium Changes for Wimbledon 2019', *Forbes* (Web Page, 11 June 2019) <<https://www.forbes.com/sites/timnewcomb/2019/06/11/wimbledons-new-no1-court-roof-marks-2019-stadium-changes/>>.

second one in the latter part of 1918 being the most deadly.<sup>1542</sup> Estimates of the number of deaths caused by the pandemic range from 20 to 50 million.<sup>1543</sup> It arrived towards the end of the First World War and ‘descended on already ravaged and poorly prepared communities’.<sup>1544</sup> However, with the EFL already suspended at the time and ‘most leagues in Europe...decimated due to war with only a small number of nations deciding to maintain league football in order to improve morale’,<sup>1545</sup> the Spanish flu’s impact on European football was not as great as it might have been.

### *11.5.1 Impact of the COVID-19 Pandemic on Competitions*

The COVID-19 pandemic has caused considerable disruption to society and businesses generally since its onset in March 2020, and sport has not been spared from this disruption. Europe has suffered particularly severely from the pandemic and has recently experienced a resurgence with infection levels higher now in many European countries than when the pandemic first arrived.<sup>1546</sup>

UEFA appeared to act quickly and decisively when the pandemic first appeared. It met on 17 March 2020 with the ECA, the European Leagues and FIFPro representing the players and agreed that EURO 2020 would be postponed until the summer of 2021, with the qualifying play-offs, originally set for March, to take place in the international window in June, pending a final review.<sup>1547</sup>

The aim was to complete all domestic and continental club competitions by 30 June 2020, providing the coronavirus situation improved and playing was deemed appropriate.<sup>1548</sup> The

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<sup>1542</sup> Callum Rice-Coates, ‘How the great Spanish flu pandemic sheds light on sport’s careful response to coronavirus’, *The Independent* (online at 24 April 2020) <<https://www.independent.co.uk/sport/coronavirus-pandemic-spanish-flu-influenza-babe-ruth-a9481476.html>>.

<sup>1543</sup> Ibid.

<sup>1544</sup> Matthew Crist, ‘The Spanish Flu brought everyday life to a grinding halt just like the spread of coronavirus has today’, *The Sportsman* (Web Page, 17 March 2020) <<https://www.thesportsman.com/articles/when-the-spanish-flu-brought-the-world-of-sport-to-a-halt-in-1918>>.

<sup>1545</sup> Ibid.

<sup>1546</sup> Maximilian de Courten, Bo Klepac Pogrmilovic and Vasso Apostolopoulos, ‘Europe’s second wave is worse than the first. What went so wrong, and what can it learn from countries like Vietnam?’, *ABC News* (online at 15 October 2020) <<https://www.abc.net.au/news/2020-10-15/europes-second-wave-is-worse-than-the-first-lesson-vietnam/12767078>>.

<sup>1547</sup> Roger Gonzales, ‘UEFA coronavirus contingency plan: Details on Champions League, domestic competitions, Euro 2020 and more’, *CBS Sports* (Web Page, 17 March 2020) <<https://www.cbssports.com/soccer/news/uefa-coronavirus-contingency-plan-details-on-champions-league-domestic-competitions-euro-2020-and-more/>>. It was also agreed that European qualifier match days set for June 2021 would be rescheduled as would the UEFA Nations League finals, UEFA Under-21 Euro and UEFA Women’s Euro 2021. The EURO qualifying play-offs eventually took place on 8 October, with the finals on 12 November 2020.

<sup>1548</sup> Ibid.

meeting encouraged clubs to explore the possibility of playing league games during the week and some UEFA club competitions at weekends for scheduling purposes. It was acknowledged that whether or not the season could be finished by 30 June would depend on how the pandemic trended over the ensuing weeks.<sup>1549</sup>

The timelines tentatively agreed at the March meeting were not able to be met. However, while UEFA president Ceferin stated that he was having sleepless nights about how much money European football was losing due to COVID-19, he acknowledged that ‘[t]he situation was not that alarming for UEFA’.<sup>1550</sup>

Initially, UEFA’s Executive Committee warned national associations to ensure that the current 2019–20 season be finished or, otherwise, clubs from their countries would face exclusion from the Champions League and Europa League, with the only exceptions being ‘where a government order prevents them from doing so’ or where ‘insurmountable financial issues make it impossible to end the season because it would jeopardise the long-term financial stability of the national competition and/or the clubs themselves’.<sup>1551</sup> This position appeared to be relaxed relatively swiftly with UEFA subsequently indicating that it encouraged domestic leagues to finish their seasons to allow for qualification for European competition to be based on sporting merit.<sup>1552</sup> For those competitions being terminated early, UEFA required the national association to provide an explanation as to why this was the case

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<sup>1549</sup> Ibid. The domestic seasons generally did not finish until the end of July with UEFA’s competitions recommencing on 7 August and the Champions League final taking place on 23 August 2020.

<sup>1550</sup> ‘UEFA’s Ceferin losing sleep over Covid-19 cost’, *The Jakarta Post* (online at 20 May 2020) <<https://www.thejakartapost.com/news/2020/05/20/uefas-ceferin-losing-sleep-over-covid-19-cost.html>>. Ceferin also said that ‘[n]ow we have to steer our ship on to the right course and we are close to doing it. Then, when things calm down, we will go back to the old tasks.’ See ‘UEFA President Ceferin: “Fans will return to stadiums soon”’, *SportsPro Media* (Web Page, 20 May 2020) <<https://www.sportspromedia.com/news/uefa-ceferin-coronavirus-fans-stadiums-ffp-luxury-tax>>.

<sup>1551</sup> Joaquin Maroto, ‘UEFA warns FAs: finish season or face Champions/League exclusion’, *AS* (Web Page, 24 April 2020) <[https://en.as.com/en/2020/04/23/football/1587675095\\_273832.html](https://en.as.com/en/2020/04/23/football/1587675095_273832.html)>. See also Tariq Panja, ‘European Soccer Teams Get Clarity and a Warning’, *The New York Times* (online at 3 April 2020) <<https://www.nytimes.com/2020/04/03/sports/european-soccer-football-canceled.html>> and Peter Hanson, ‘Coronavirus: UEFA to produce qualification guidelines in cases of cancelled leagues’, *Sporting News* (Web Page, 22 April 2020) <<https://www.sportingnews.com/au/football/news/coronavirus-uefa-to-produce-european-competition-qualification-guidelines-in-cases-of-cancelled-leagues/8dwimbmbbfshlei2ykl3rvqa2>>.

<sup>1552</sup> Simon Evans, ‘UEFA gives European leagues May 25 deadline for restart plans’, *Reuters* (Web Page, 28 April 2020) <<https://www.reuters.com/article/instant-article/idINL5N2CG3YX>>. See also ‘UEFA sets European leagues May 25 deadline for restart plans’, *ESPN* (Web Page, 28 April 2020) <<https://www.espn.com.au/football/uefa-champions-league/story/4090044/uefa-sets-european-leagues-may-25-deadline-for-restart-plans>> and Tom Webber, ‘UEFA sets 25 May deadline for leagues to decide plans to finish season due to coronavirus pandemic’, *Goal* (Web Page, 28 April 2020) <<https://www.goal.com/en/news/uefa-sets-may-25-deadline-for-leagues-to-decide-plans-to/h10k2x8xr4cl1t738chdrpd>>.

and a list of clubs selected for UEFA's 2020–21 competitions based on sporting merit in the 2019–20 domestic competitions.<sup>1553</sup>

Four of the top five national leagues in Europe eventually completed their 2019–20 seasons, which appeared sensible from an economic perspective because they all had lucrative broadcasting contracts to fulfil. Broadcasting revenue accounts for 53% of the total income for clubs in the EPL, 42% for clubs in La Liga, 34% for clubs in Division 1 of the Bundesliga, 47% for clubs in Serie A, and 37% for clubs in Ligue 1.<sup>1554</sup> Of the five top European football countries, only France did not restart due to French Prime Minister Edouard Philippe declaring that sporting events, including professional football, would not be allowed in France until September 2020. In the circumstances, the French television broadcasters agreed to pay for matches already televised but at reduced prices.<sup>1555</sup> The French Ligue took out 'a state-guaranteed loan (c €224.5m) to make up for the shortfall in broadcast rights monies caused by the termination of the 2019–20 season'.<sup>1556</sup> In the EPL, all remaining 92 games were broadcast live with broadcasters reputedly demanding a rebate of approximately £340 million, which was about one half of the £762 million outstanding.<sup>1557</sup> In Germany, broadcasters agreed to an up-front payment of a third of the agreed sum due for outstanding games and then to pay the remaining two-thirds after each game.<sup>1558</sup> The broadcasters secured a discount on the overall payment fee for partially paying the sum due in advance.<sup>1559</sup>

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<sup>1553</sup> Ibid.

<sup>1554</sup> UEFA (n 984) 68.

<sup>1555</sup> Lawinsport, 'Coronavirus and its impact on football Version 2.0' (5 May 2020) 19 <<https://www.lawinsport.com/topics/covid19-impact/item/coronavirus-a-and-its-impact-on-football-a-sports-law-and-policy-centre-and-lawinsport-joint-survey>>.

<sup>1556</sup> Ibid 4.

<sup>1557</sup> Alex Young, 'Premier League Project Restart: Return date, TV fixture schedule latest for EPL, FA Cup and Champions League', *Lawinsport* (1 June 2020) 5 <<https://www.lawinsport.com/topics/covid19-impact/item/coronavirus-a-and-its-impact-on-football-a-sports-law-and-policy-centre-and-lawinsport-joint-survey>>.

<sup>1558</sup> Lawinsport (n 1555) 22.

<sup>1559</sup> Ibid.

Second tier countries which did not have large broadcasting agreements took different decisions on how to proceed. The Netherlands,<sup>1560</sup> Belgium<sup>1561</sup> and Scotland<sup>1562</sup> ended their seasons, whereas other countries including Serbia, Croatia, Turkey, Switzerland,<sup>1563</sup> Russia, Ukraine<sup>1564</sup> and Romania decided to restart. Many of the smaller countries such as Wales, Cyprus, Gibraltar, Luxembourg and Malta decided to end their seasons, although some, including Belarus,<sup>1565</sup> Montenegro, North Macedonia, Iceland, Georgia and the Faroe Islands managed to resume and complete their seasons.<sup>1566</sup>

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<sup>1560</sup> The Netherlands had little choice due to national legislation preventing organised sport until 1 September, although the Dutch football association had made the decision to declare the Netherlands 2019–20 season null and void on 24 April. See ‘Organised sport given September restart date in Netherlands’, *The Guardian* (online at 7 May 2020) <<https://www.theguardian.com/sport/2020/may/06/organised-sport-given-september-restart-date-in-the-netherlands#>> and ‘Premier League completion “probably not realistic”, says Dutch FA president’, *The Guardian* (online at 25 April 2020) <<https://www.theguardian.com/football/2020/apr/25/premier-league-completion-probably-not-realistic-says-dutch-fa-president-just-spee>>.

<sup>1561</sup> Belgium ended its season on 15 May with the Belgium government extending its ban on sports events until the end of July. See Chris Myson, ‘Coronavirus: Belgian Pro League season officially ends, Club Brugge crowned champion’, *SportsStar* (Web Page, 16 May 2020) <<https://sportstar.thehindu.com/football/belgian-pro-league-season-ends-club-brugge-crowned-champion-coronavirus-pandemic-covid-19-belgium-relegation/article31598834.ece>> and ‘Govt ends hopes of Belgium soccer restart’, *Nine Wide World of Sports* (Web Page, 6 May 2020) <<https://www.wow.nine.com.au/football/govt-ends-hopes-of-belgium-soccer-restart/2bde516d-fc6d-472c-8553-9986f1c5f3e9>>.

<sup>1562</sup> Scotland’s Premier League Board brought its competition to an end as completing the season was unfeasible and on the basis ‘that the league can now pay out around £7m of prize money immediately’. See ‘Celtic champions and Hearts relegated after SPFL ends season’, *BBC Sport* (Web Page, 18 May 2020) <<https://www.bbc.com/sport/football/52646282#>>.

<sup>1563</sup> In Switzerland, some clubs including FC Sion, felt it was unviable to continue the season. Sion’s President stated that ‘[n]inety three per cent of our resources come from ticket office sales, members and sponsors, and only seven per cent from television rights.’ However, it was decided by a majority of 17–3 of the Swiss clubs to recommence the season on 19 June 2020. See ‘Coronavirus: Swiss Super League prepares for training return despite restart row’, *The Strait Times* (online at 11 May 2020) <<https://www.straittimes.com/sport/football/coronavirus-swiss-super-league-prepares-for-training-return-despite-restart-row>> and ‘Football restart in Switzerland! The Super League is scheduled to continue on June 20’, *Archyde* (Web Page, 29 May 2020) <<https://www.archyde.com/football-restart-in-switzerland-the-super-league-is-scheduled-to-continue-on-june-20/>>.

<sup>1564</sup> In Ukraine, the season was due to restart, however, positive tests among some players disrupted the restart, but the season did eventually complete with FC Shakhtar winning their fourth premiership in a row. See Reuters, ‘Ukraine’s football restart disrupted by positive COVID-19 tests among players, staff’, *Daily Sabah* (Web Page, 30 May 2020) <<https://www.dailysabah.com/sports/football/ukraines-football-restart-disrupted-by-positive-covid-19-tests-among-players-staff>> and ‘The UPL collective congratulates FC Shakhtar on the Championship’, *Ukrainian Premier League* (Web Page, 20 June 2020) <[www.upl.ua](http://www.upl.ua)>.

<sup>1565</sup> Belarus continued to play through the pandemic and secured ten television contracts with countries including Russia, India, Israel and Ukraine. See “‘No viruses here’: Belarus fills soccer void amid Covid-19 halt”, *The New Daily* (online at 30 March 2020) <<https://thenewdaily.com.au/news/coronavirus/2020/03/30/belarus-soccer-coronavirus/>>. See also Paul Gilmour, ‘Coronavirus: Why the Belarus Premier league kept playing during pandemic’, *Sky Sports* (Web Page, 13 May 2020) <<https://www.skysports.com/football/news/12040/11987900/coronavirus-why-the-belarus-premier-league-kept-playing-during-pandemic>>.

<sup>1566</sup> ‘Factbox: European soccer’s return to action after coronavirus’, *Reuters* (Web Page, 29 May 2020) <<https://www.reuters.com/article/uk-health-coronavirus-soccer-europe-fact-idUKKBN23D0UB>>.

Completion dates of the 2019–20 season for those of the main European National Leagues able to complete their competitions varied from 27 June for the Bundesliga<sup>1567</sup> through to 2 August for Serie A.<sup>1568</sup> The completion of the competitions in the national leagues meant that UEFA’s competitions could then be concluded. UEFA decided on 17 June that the four outstanding games from the round of 16 would be played 5–8 August with the final stages of both its UCL and UEL1 competitions featuring a change in configuration with the quarter-finals, semi-finals and final being played in a single-leg format between 12–23 August in Lisbon<sup>1569</sup> and 10–21 August in the North Rhine-Westphalia region of Germany, respectively.<sup>1570</sup> These locations were primarily chosen because of the availability of suitable stadia.<sup>1571</sup>

The manner in which European football seems to have recovered and completed its outstanding competitions indicates that, at least in this sphere, UEFA has been successful in helping European football back on the path to recovery after the initial wave of the COVID-19 pandemic. This has been achieved by treating the safety of the stakeholders as a matter of prime importance with COVID-19 testing of players before each game and the total ban on spectators at the matches. UEFA managed to organise the running of the various competitions so there was a continuous flow between the competitions from the completion of the 2019–20 national league seasons, which was immediately followed by the finalisation of UEFA competitions for that season. The smoothness of this operation can be seen in the manner in which the final stages of the UEFA competitions were conducted, as discussed above, with cleverly conceived changes to the competition rules and the relocation of the competitions to designated geographical areas allowing the latter rounds of both competitions to be completed in two and a half weeks. Flexibility and adaptability were utilised to achieve this. UEFA also

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<sup>1567</sup> ‘Bundesliga 2019/20 results’, *FlashScore* (Web Page, viewed 16 November 2020)

[<https://www.flashscore.com/football/germany/bundesliga-2019-2020/>](https://www.flashscore.com/football/germany/bundesliga-2019-2020/).

<sup>1568</sup> ‘Serie A 2019-20 Season Review’, *Football Italia* (Web Page, viewed 16 November 2020)

[.<https://www.football-italia.net/SerieA/season/2019-20/Review>](https://www.football-italia.net/SerieA/season/2019-20/Review).

<sup>1569</sup> UEFA, ‘Champions League to resume on 7 August’, *UEFA.com* (Web Page, 17 June 2020)

[.<https://www.uefa.com/uefachampionsleague/news/025e-0f9a3f8c5c4d-3323c8a96a4d-1000/>](https://www.uefa.com/uefachampionsleague/news/025e-0f9a3f8c5c4d-3323c8a96a4d-1000/).

<sup>1570</sup> UEFA, ‘Updated UEFA Competitions Calendar’, *UEFA.com* (Web Page, 9 July 2020)

[.<https://www.uefa.com/insideuefa/about-uefa/news/0262-1081498f8833-04c0fb0a653d-1000--this-season-s-competitions-calendar/>](https://www.uefa.com/insideuefa/about-uefa/news/0262-1081498f8833-04c0fb0a653d-1000--this-season-s-competitions-calendar/).

<sup>1571</sup> “‘Bild’”: UEFA to move Champions League final stages to Lisbon’, *BeSoccer* (Web Page, 7 June 2020)

[.<https://www.besoccer.com/new/bild-uefa-to-move-champions-league-final-stages-to-lisbon-843908>](https://www.besoccer.com/new/bild-uefa-to-move-champions-league-final-stages-to-lisbon-843908). See

also Ryan Kelly, ‘Europa league 2020 tournament: Where and when will matches take place’, *Goal* (Web Page, 6 August 2020) [.<https://www.goal.com/en/news/europa-league-2020-tournament-where-when-will-matches-take/72k9fz0414i180jmlzv0glqv>](https://www.goal.com/en/news/europa-league-2020-tournament-where-when-will-matches-take/72k9fz0414i180jmlzv0glqv). The Estadio da Luz (home of Benfica) and Estadio Jose Alvalade (home of Sporting CP) are in Lisbon and the stadia in Cologne, Duisburg, Dusseldorf and Gelsenkirchen are all situated in the North Rhine–Westphalia region in Germany.

displayed similar qualities in acknowledging that its initial date set on 17 March for completion of the national league seasons by 30 June not going to be feasible and that expecting all national leagues to resume and complete their seasons was an unreasonably harsh expectation. It, therefore, quickly relaxed its original decision to allow the national leagues to make their own individual decisions.

The successful, albeit slightly late, completion of the 2019–20 season meant that European football was reasonably well-placed to commence the 2020–21 season, although the delay in completing the previous season did delay the start of the new national league seasons for 2020–21 by approximately one month.<sup>1572</sup> It was hoped that the impact of the virus would reduce thus making it feasible to allow spectators at games. However, a second wave of the virus, more virulent than the first, prevented this from occurring. That was a financial blow to those clubs in lower leagues which rely on gate receipts for the majority of their income. Clubs in the higher leagues, however, have been able to gain some revenue from their broadcasting arrangements.

### *11.5.2 Impact of the COVID-19 Pandemic on the FFP Regulations*

UEFA needed to consider amending its FFP Regulations because the COVID-19 pandemic had had a major impact on club incomes and, clearly, meeting the breakeven requirement would be impossible for many clubs.

In response to the COVID-19 pandemic, UEFA established a new body entitled the UEFA Emergency Working Group on Legal, Regulatory and Financial Matters (‘UEFA Emergency Working Group’). This body produced an Addendum to the FFP Regulations which was adopted by the UEFA Executive Committee on 18 June 2020.

The three main objectives of the Addendum are:

- to provide clubs with flexibility in relation to the timely satisfaction of their transfer and salary obligations;
- to permit clubs to adjust the break-even calculations to account for COVID-19 related loss of revenue (relevant for reporting in 2020 and 2021); and

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<sup>1572</sup> ‘When will La Liga, Serie A, Bundesliga and other European Leagues 2020-21 seasons start and finish’, *Goal* (Web Page, 24 July 2020) <<https://www.goal.com/en-tza/news/when-do-2020-21-epl-la-liga-serie-a-bundesliga-major/128n7rnlluovy1c51tvt5ebup>>. The new seasons began in mid-September 2020 rather than in mid-August.

- to postpone for one season the assessment of the financial year ending in 2020 in order to facilitate compliance of the clubs with the FFP Regulations.<sup>1573</sup>

The actual changes include amending the ‘no overdue payables’ rule solely for the 2020–21 licence period with Articles 65, 66 and 66bis of the FFP regulations being changed to provide a date of 31 July when clubs have to show that they have no overdue payables. In effect, this gives clubs an extra month to meet their commitments. In order that UEFA can cross-reference the data it obtains, clubs are also required to disclose all transfers for which an amount is outstanding at 30 June and 30 September and all amounts settled between 30 June and 31 July.

The Addendum also makes changes to Articles 59(1), 59(2) and 62(1), reducing the 2020–21 monitoring period to cover only two reporting periods ending in 2018 and 2019 and increasing the 2021–22 monitoring period to cover four reporting periods ending in 2018, 2019, 2020 and 2021. The outcome is that the assessment of financial year 2020 is postponed by one year and years 2020 and 2021 will be assessed together as one reporting period. In this way the adverse impact of COVID-19 ‘is counterbalanced by averaging the deficits of the combined years 2020 and 2021’.<sup>1574</sup> It also enables clubs ‘to use projections for the reporting period ending in 2021 in order to reach a more beneficial break-even result’.<sup>1575</sup>

The reporting period for 2020 and 2021 is also subject to adjustments. First, if the breakeven result is a deficit, the result is halved and secondly, the remaining breakeven deficit can be adjusted to take into account the adverse financial impact due to COVID-19. The adverse financial impact is covered in a new Part G to Annex X of the FFP Regulations and is ‘the loss of revenue calculated as the difference between the actual average revenues for the reporting revenues for the reporting periods ending in 2020 and 2021 and the corresponding anticipated average revenues for the same periods’.<sup>1576</sup> The anticipated average revenues utilise the revenues in the 2019 reporting period as minimum amounts, which can be increased if evidence is produced in the form of legal or contractual arrangements concluded before the

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<sup>1573</sup> Kalin Ivanov, ‘Countering COVID-19: An overview of the amendments to UEFA’s Financial Fair Play Rules’, *Linklaters* (Blog Post, 8 July 2020) <<https://www.linklaters.com/en/insights/blogs/sportinglinks/2020/july/countering-covid-19-an-overview-of-the-amendments-to-uefas-financial-fair-play-rules>>.

<sup>1574</sup> Stella Riberti and Paolo Macchi, ‘UEFA adopts temporary emergency measures for Financial Fair Play’, *Mondaq* (Web Page, 3 July 2020) <<https://www.mondaq.com/italy/financing/961968/uefa-adopts-temporary-emergency-measures-for-financial-fair-play>>.

<sup>1575</sup> Ivanov (n 1573) 2.

<sup>1576</sup> *Ibid.*



COVID-19 pandemic.<sup>1577</sup> Adjustments of this nature are only allowable in the areas of gate receipts, sponsorship and advertising, broadcasting rights, commercial activities and other operating revenue.<sup>1578</sup> Any decrease in UEFA solidarity funding and prize money can be taken into account but any additional revenue/income including the net result from player transfers cannot be taken into account.<sup>1579</sup>

UEFA's addendum appears to be reasonably fair. Initially, in March 2020 before the severe implications of COVID-19 became apparent, UEFA was only looking at making changes to the overdue payables rule. However, once the severity of the pandemic became clearer and it was obvious that clubs were going to be hit badly with revenue losses, UEFA appreciated that some changes to the FFP Regulations would also be needed in regard to the breakeven principle. Clubs have not immediately criticised the changes made by the addendum, but this is hardly surprising as it is far too early to determine whether the changes are going to be sufficient to deal with the situation. It is likely that most clubs would be relieved to see that UEFA has at least acknowledged that a problem exists and, through its changes, has prevented the clubs from having to deal with the matter immediately. Time has been provided to see how the pandemic plays out and whether this will lead to an improvement, or to deterioration in the state of European football. At the time of writing, however, with matches still taking place without spectators and with the COVID-19 pandemic lasting longer than was initially anticipated, UEFA may have to make further adjustments to its Addendum or, alternatively, apply a relaxed interpretation to the rules currently in place to assist clubs with their financial situation.

UEFA does need, however, to play a waiting game and not relax its rules too quickly. The vast majority of clubs will be in a situation where their expenses exceed their income with revenue from TV broadcasting and gate receipts being either reduced or non-existent during the period of the pandemic. Taking this into account, '[c]ommon sense would then dictate that keeping the Financial Fair Play rules in place, as they are currently, would be an unfair measure on every single club at this time.'<sup>1580</sup> Notwithstanding this, clubs, such as Manchester City and PSG, with the links of their owners to the wealthy states of Abu Dhabi and Qatar

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<sup>1577</sup> UEFA, *Addendum to the UEFA Club Licensing and Financial Fair Play Regulations* (Edition 2018) Part B. Monitoring requirements – Break-even rule for the monitoring periods 2020–21 and 2021–22.

<sup>1578</sup> *Ibid.*

<sup>1579</sup> *Ibid.*

<sup>1580</sup> MA Rodriguez and Jose Felix Dias, 'UEFA evaluating possibility of suspending Financial Fair Play rules due to coronavirus', *MARCA* (Web Page, 20 March 2020) <<https://www.marca.com/en/football/international-football/2020/03/20/5e74e481268e3efd048b45b9.html>>.

respectively, are unlikely to be troubled financially by the pandemic, and could even use the current situation to secure more funds from their owners for the purchase of players. Spanish League President Javier Tebas has raised this issue, stating that he has no objection to owners using their financial resources to reduce the debts of their clubs, but he believes it would be wrong to allow clubs ‘to inflate bank balances, which can be spent on players’.<sup>1581</sup> As always UEFA needs to act with care and balance to ensure it is as fair as possible to all stakeholders.

The effect on clubs, both higher-ranked as well as lower-ranked clubs, will vary considerably. Much will depend on what surplus funds a club may have available to maintain its position as a going concern during the pandemic. In Germany, for example, Bayern Munich, Bayer Leverkusen, Borussia Dortmund and RB Leipzig have created a €20 million solidarity fund from their earnings in UEFA competitions this season ‘to help German clubs in the top two tiers’.<sup>1582</sup> These particular clubs are obviously in a relatively strong financial position, but other clubs, even some in the top leagues, may find their financial situation more challenging and struggle to survive.

This difference in financial position between clubs competing in the same league competition was evident when matches were not being played in the period between March and June 2020 with several of the EPL clubs, including Southampton, West Ham United, Sheffield United, Aston Villa and Watford, seeking wage deferral agreements with their players<sup>1583</sup> and Arsenal negotiating a 12.5% wage cut with its players for a one year period from April 2020 to March 2021.<sup>1584</sup> These negotiations followed an attempt to reach a collective agreement among the EPL clubs for a 30% pay cut for all players, which was strongly opposed by the Professional Footballer’s Association.<sup>1585</sup> Originally, Bournemouth, Newcastle, Norwich, Tottenham and Liverpool sought the Coronavirus Job Retention Scheme for their non-playing staff but after

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<sup>1581</sup> Associated Press, ‘UEFA exploring changes to Financial Fair Play as coronavirus impacts economy’, *Sports Illustrated* (Web Page, 7 April 2020) <<https://www.si.com/soccer/2020/04/07/uefa-financial-fair-play-ffp-rules-coronavirus-pandemic>>.

<sup>1582</sup> ‘Germany’s Champions league quartet create €20m fund for struggling clubs’, *The Guardian* (online at 27 March 2020) <<https://www.theguardian.com/football/2020/mar/26/germany-champions-league-clubs-create-20m-fund-for-struggling-clubs-dortmund-bayern-leipzig-leverkusen-bundesliga#>>.

<sup>1583</sup> ‘Watford join Premier League clubs to agree player wage deferral’, *Yahoo Sports* (Web Page, 23 April 2020) <<https://sports.yahoo.com/watford-join-premier-league-clubs-agree-player-wage-204009491--sow.html>>.

<sup>1584</sup> Sami Mokbel, ‘Arsenal stars set to agree 12.5 per cent PAY CUT after stand off with board as they are offered lucrative Champions League bonus...becoming first club to agree pay cut rather than deferrals’, *The Daily Mail* (online at 17 April 2020) <[www.dailymail.co.uk](http://www.dailymail.co.uk)>.

<sup>1585</sup> Jacob Steinberg, ‘Premier League clubs may go it alone on paycut talks as impasse continues’, *The Daily Mail* (online at 6 April 2020) <<https://www.dailymail.co.uk/sport/football/article-8229093/Arsenal-stars-agree-12-5-cent-PAY-CUT-offered-lucrative-Champions-League-bonus.html>>.

public criticism Bournemouth, Liverpool and Tottenham withdrew from it,<sup>1586</sup> leaving Newcastle and Norwich as the only recipients.<sup>1587</sup> However, the EPL provides a good example of how the pandemic has affected the clubs differently with Manchester United not asking its players to take pay cuts or defer their wages.<sup>1588</sup> It should also be noted that there seems to have been less concern shown by the EPL clubs over their financial position since the return of football in June, even though the games have been played behind closed doors. At least the broadcasting revenue has recommenced, which provides them with a reasonable income.

The Championship league appears to be more vulnerable than the other leagues in England with player wages higher in this league than the lower ones but, unlike the EPL, they do not have a large broadcasting revenue to offset their wage expenses. Further, clubs in the Championship league made combined losses of £650 million in the 2018–19 season so it is unlikely that many had cash reserves to meet current revenue shortfalls.<sup>1589</sup> Efforts were made to find a centrally agreed approach to resolve player wages, but this failed so clubs sought to come to their own arrangements.<sup>1590</sup> More recently, the clubs in the Championship league have agreed to the introduction of a salary cap of £18 million from the start of the 2021–22 season,<sup>1591</sup> which may reduce future financial pressure.

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<sup>1586</sup> ‘Premier League clubs accused of ‘moral vacuum’ over pay during virus crisis’, *The Guardian* (online at 1 April 2020) <<https://www.theguardian.com/football/2020/apr/01/premier-league-clubs-accused-of-being-in-moral-vacuum-over-pay-coronavirus#>>.

<sup>1587</sup> Dan Ripley, ‘Newcastle could follow Liverpool, Tottenham and Bournemouth by making furlough U-turn on non-paying staff once 300GBP takeover from Mike Ashley is completed’, *The Daily Mail* (online at 16 April 2020) <<https://www.dailymail.co.uk/sport/sportsnews/article-8224789/Newcastle-latest-make-furlough-U-turn-non-playing-300m-takeover.html>>. The government funded scheme allows employers to claim 80% of an employee’s salary not worked, up to 2,500 GBP per month.

<sup>1588</sup> Josh Fordham, ‘Manchester United ‘not planning’ to ask star players to take pay cut during coronavirus pandemic’, *TalkSport* (Web Page, 19 April 2020) <<https://talksport.com/football/696123/man-united-not-planning-players-pay-cuts-coronavirus/>>.

<sup>1589</sup> Matt Hughes, ‘Championship clubs face civil war with talks over uniform wage cuts on brink of collapse in coronavirus crisis’, *The Daily Mail* (online at 10 April 2020) <<https://www.dailymail.co.uk/sport/football/article-8206395/Championship-clubs-face-civil-war-talks-uniform-wage-cuts-brink-collapse.html>>.

<sup>1590</sup> Alan Nixon, ‘Wage War. Angry Championship clubs want rivals given transfer bans for wage deferrals’, *The Sun* (online at 19 April 2020) <<https://www.thesun.co.uk/sport/football/11428606/championship-clubs-coronavirus-wage-cuts-row>>. The situation caused some animosity between the Championship clubs with those clubs including West Bromwich Albion, Preston, Stoke and Middlesbrough, which had paid their players in full, becoming concerned that other clubs which negotiated wage deferrals with their players would use the money saved to improve their playing squads.

<sup>1591</sup> Mike Keegan, ‘Promoted Premier League clubs could be hit with points deductions if they breach proposed £18m salary cap in the Championship set to be brought in from next season’, *The Daily Mail* (online at 15 December 2020) <<https://www.dailymail.co.uk/sport/football/article-9053171/Championship-salary-cheats-hit-points-deductions-Premier-League.html>>.

The position of clubs in the lower divisions of English football is generally worse because gate receipts are their main income.<sup>1592</sup> League 1, League 2 and National League voted to end their 2019–20 seasons early.<sup>1593</sup> Initially it was decided to introduce salary caps to both League 1 and League 2 of £2.5 million and £1.5 million respectively.<sup>1594</sup> However, the salary caps were subsequently withdrawn because The Professional Footballers' Association challenged the caps stating they were 'unlawful and unenforceable' and an independent arbitration panel held that the EFL was in breach of the professional Football Negotiating and Consultative Committee's Constitution in introducing the caps.<sup>1595</sup>

Clubs in other major European countries are facing similar financial problems to those in England. It was reported that in Germany, 13 out of the 36 Bundesliga clubs comprising Division 1 and 2 could be in severe financial problems if football was not resumed in May 2020.<sup>1596</sup> In France, concerns have also been raised, with it being suggested that '[m]any of France's professional clubs in Ligue 1 and Ligue 2 will declare bankruptcy within six months if the coronavirus pandemic continues to halt football in the country'.<sup>1597</sup> Players contracted to leading Italian club, Juventus, agreed to forego four months of wages amounting to €90 million to assist their club.<sup>1598</sup> It has been suggested that Spanish club Barcelona, one of the wealthiest clubs in Europe, may even find itself in difficulties due to the pandemic, arising

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<sup>1592</sup> In English football, the Premier League is the first division, the Championship is the second division, League 1 is the third division, League 2 is the fourth division, and the National League is the fifth division.

<sup>1593</sup> 'League One and League Two clubs vote to end seasons early', *BBC Sport* (Web Page, 9 June 2020) <<https://www.bbc.com/sport/football/52381612>> and 'National League clubs vote to end regular season immediately', *BBC Sport* (Web Page, 22 April 2020) <<https://www.bbc.com/sport/football/52680375>>. Initially, in League 1 six clubs, including Sunderland, Portsmouth and Ipswich Town, wanted to continue the season with the remainder looking to end it. However, new regulations proposed by the EFL board and approved by the 71 clubs meant that only 51% of teams in any given division was required to end the season early and this was obtained. See Andrew Aloia and James Law, 'EFL: How coronavirus is affecting lower-league clubs, players, fans, and livelihoods', *BBC Sport* (Web Page, 22 May 2020) <<https://www.bbc.com/sport/football/52705124#>>.

<sup>1594</sup> Jack Rosser, 'League One and Two vote to introduce salary cap from 2020/21 season', *The Standard* (online at 7 August 2020) <<https://www.standard.co.uk/sport/football/league-one-two-salary-cap-immediately-a4519376.html>>.

<sup>1595</sup> 'Sky Bet EFL: Salary caps in League One and Two withdrawn following arbitration panel ruling', *Sporting Life* (Web Page, 9 February 2021) <<https://www.sportinglife.com/football/news/no-salary-caps-in-league-one-and-two/189083>>.

<sup>1596</sup> Sports Money, '13 of 36 Bundesliga clubs face financial problems, Bayern Munich resume practice', *Forbes* (Web Page, 6 April 2020) <<https://www.forbes.com/sites/manuelveth/2020/04/06/13-of-36-bundesliga-clubs-face-financial-problems-bayern-munich-resumes-practice/>>. Football recommenced in Germany on 16 May.

<sup>1597</sup> Jonathan Johnson, 'Coronavirus could force Ligue 1 clubs into bankruptcy – Saint-Etienne chief', *ESPN* (Web Page, 23 March 2020) <<https://www.espn.com.au/football/french-ligue-1/story/4077669/coronavirus-could-force-ligue-1-clubs-into-bankruptcy-saint-etienne-chief>>. Ligue 1 started its 2020/21 season on 21 August 2020 and Ligue 2 on 22 August 2020.

<sup>1598</sup> 'Juventus players waive four months' wages due to coronavirus outbreak', *The Guardian* (online at 29 March 2020) <<https://www.theguardian.com/football/2020/mar/28/juventus-players-wages-coronavirus-serie-a>>.

from some rash spending on disappointing players like Ousmane Dembele and Philippe Coutinho. Barcelona also has a large wage bill, averaging €11 million per year per player, which gives the club a high percentage of wages to revenue of 69%.<sup>1599</sup> The financial position of lower division clubs within other European leagues tend to equate to those in England.<sup>1600</sup>

With the COVID-19 pandemic having global repercussions and extending beyond football, there are government funding schemes available in many European countries, which clubs can utilise to assist with payment of their players and staff. In France, for instance, the club compensates its players at 70% of their gross revenue and the state reimburses the club to a limit of €4,850 per employee per month.<sup>1601</sup> Germany has slightly different conditions with employers having the right to reduce a player's pay to zero ('Kurzarbeit Null') and the player receives a payment from the government of up to €4,623 per month.<sup>1602</sup> In England, the government has introduced a job retention scheme allowing employers to place employees on leave with the government paying the employee 80% of his or her wage up to a sum of £2500 per month.<sup>1603</sup> Many other European countries including Italy, Spain, Portugal, Holland, and Belgium have similar schemes in place.<sup>1604</sup> However, there is some doubt as to how effective these funding schemes will be for football clubs, where their main employees are their players who tend to earn considerably more than the average worker. It is therefore unlikely that the government subsidies will provide a meaningful amount of financial assistance to most clubs.

Some national federations have provided assistance to their clubs, but it appears that many do not have substantial funds to provide that support. The EPL has provided the EFL and the

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<sup>1599</sup> Richard Fitzpatrick, 'Why Barcelona are vulnerable to a financial disorder over Covid-19', *Bleacher Report* (Web Page, 20 May 2020) <<https://bleacherreport.com/articles/2892368-why-barcelona-are-vulnerable-to-a-financial-disaster-over-covid-19>>.

<sup>1600</sup> AP, 'Lower-division soccer clubs among hardest hit by coronavirus pandemic', *Deccan Herald* (online at 21 March 2020) <<https://www.deccanherald.com/sports/football/lower-division-soccer-clubs-among-hardest-hit-by-coronavirus-pandemic-816159.html>>. Burgos, a Spanish third division club, is doing reasonably well due to a recently released special membership package but Italian third division side, Casertana, was one of several teams that was unable to continue paying its players' wages. Burgos Club President Franco Caselli succinctly summarised the position of clubs in the lower European divisions, stating that '[i]n most countries, there are no lucrative television broadcast deals for teams outside the first and second divisions. Their income comes mostly from ticket sales, small sponsors, team merchandising, season memberships and youth academy memberships.'

<sup>1601</sup> Lawinsport (n 1555) 19.

<sup>1602</sup> *Ibid* 22.

<sup>1603</sup> *Ibid* 14.

<sup>1604</sup> *Ibid* 4.

National League with £125 million<sup>1605</sup> and the EFL has created a £50 million relief fund from which ‘clubs will receive a grant and also be eligible to apply for interest free loans’.<sup>1606</sup> The German Football Association negotiated funding from private institutions for clubs in need and the Deutsche Fussball Liga provided a €50 million relief fund.<sup>1607</sup> The French Federation of Football does not appear to have provided any direct financial assistance but its football clubs can access ‘state-guaranteed loans with their respective banks’.<sup>1608</sup> In Spain, the Royal Spanish Football Federation organised a €4 million treasury advance aid ‘to help clubs paying the salaries of players and coaches of their first teams’.<sup>1609</sup> Assistance was also made available to some second tier countries including Croatia,<sup>1610</sup> Holland,<sup>1611</sup> Portugal<sup>1612</sup> and Switzerland.<sup>1613</sup> Once again, although there is some assistance available it is unlikely to be sufficient, even with government funding, to provide an answer to the financial issues that many clubs face as a result of the COVID-19 pandemic.

In summary, UEFA appears to have handled the pandemic as well as can be expected in the circumstances. It managed to safeguard the safety of its stakeholders but also ensure the 2019–20 season was completed. In addition, the 2020–21 season is running relatively smoothly. It has also put the FFP Regulations on hold for one year and provided broad provisions for clubs to take into account their COVID-19 losses in certain specific areas when calculating their income. However, UEFA’s efforts have not resolved the basic issue that clubs are continuing to lose income as a result of the COVID-19 pandemic and there is no ready source of financial assistance to help them alleviate their positions.

With major financial assistance not being readily available it is important for each club to address the problems caused by the COVID-19 pandemic themselves. The main issue is likely to be that their expenditure now exceeds their income. In these circumstances, clubs need to

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<sup>1605</sup> Ibid 4.

<sup>1606</sup> Ibid 15.

<sup>1607</sup> Ibid 4.

<sup>1608</sup> Ibid 19.

<sup>1609</sup> Ibid 29.

<sup>1610</sup> Ibid 36. The Croatian federation does not have a common fund but has paid a broadcasting revenue payment early.

<sup>1611</sup> Ibid 39. In Holland, the Dutch football association, with assistance from some Dutch internationals and the ING bank, has set up a €11 million emergency fund to be shared 50/50 between professional and amateur clubs.

<sup>1612</sup> Ibid 43. The Portuguese federation has set up a €4.7 million support fund.

<sup>1613</sup> Ibid 54. Although the Swiss Federation has not set up a specific fund, the Swiss government has provided CHF 50 million in the form of interest-free loans for professional sports teams.

look at ways to reduce expenditure. The main expenditure which clubs have is player wages and these are governed by the contracts which clubs have with their players. Clubs need to review their approach to future player contracts to ensure their positions are protected if matches are disrupted by an unforeseen event, like the COVID-19 pandemic.

### *11.6 Clubs and Player Contracts in the Pandemic Environment*

From a legal perspective, in common law jurisdictions, the terms of the contract between club and player are important with the doctrine of absolute liability applying. That means if a party voluntarily enters into a contract that party must perform its agreed obligations.<sup>1614</sup> Thus if a player honours the terms of his contract he can expect his club to reciprocate by honouring its obligations including to pay the agreed salary as set out in the contract. Nonetheless, the difficulties associated with COVID-19 pandemic raise the question as to whether the contract can be performed, and it may be possible for clubs to raise the defence of force majeure. Force majeure usually applies ‘to exclude liability where a party’s failure to perform is caused by forces beyond its control’.<sup>1615</sup> At common law force majeure does not arise automatically so there is a need for a clause to be inserted in the contract to cover it. Since currently the EPL and the EFL contracts do not contain a force majeure clause it will not apply in England.

The common law does provide an alternative possible remedy in the doctrine of frustration. Frustration will apply to a contract where performance becomes impossible or radically different from what was envisaged by the original agreement, due to no fault of the parties.<sup>1616</sup> It is unusual for employment contracts to be frustrated because this would require the situation to be so completely different to that anticipated that performance as agreed becomes impossible.<sup>1617</sup> This would be feasible where, perhaps through government legislation, a

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<sup>1614</sup> *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462. At 465, Jessel MR said, ‘If there is one thing which more than any other public policy requires it is that men of age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice.’ See also Paul Venus and Scott Alden, ‘Force majeure and Covid-19 – what you need to know now’,  *Holding Redlich* (Web Page, 18 March 2020) <<https://www.holdingredlich.com/force-majeure-and-covid-19-what-you-need-to-know-now>>.

<sup>1615</sup> *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. In this case, the contract was not frustrated because performance had not been rendered ‘radically different’. See also Venus and Alden (n 1614).

<sup>1616</sup> *Morgan v Manser* [1948] 1 KB 184. In this case, the 10 year employment contract was frustrated because the employee was conscripted in 1940 and was not demobilised until 1946, causing performance envisaged by the original contract not to be achieved. See also Venus and Alden (n 1614).

<sup>1617</sup> *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301. In this case, the employee was sentenced to Borstal training and the court held that the way in which his apprenticeship could be performed was radically different to what had originally been contemplated. Therefore, the contract had been frustrated and the employee had not been unfairly dismissed. See also Lawinsport (n 1555) 17.

situation arose in which an employer was prevented from providing work to her or his employees and/or the employee was prevented from performing the work.<sup>1618</sup> The COVID-19 pandemic, however, does not appear to have done this. Frustration depends on the anticipated duration of the delay and how this relates to the length of the contract. The anticipated delay to football in England was only seen as being short-term with the aim of completing the league competitions as soon as possible. Bearing this in mind, the COVID-19 pandemic seems to have delayed performance of the player contracts, rather than having frustrated them.<sup>1619</sup> In England, therefore, with the doctrine of frustration and force majeure unlikely to apply, the only means of changing the contract is through the mutual consent of the parties.

In civil law jurisdictions, the availability of force majeure is usually contained in legislation so can apply to contracts which do not specifically refer to it. However, its use in civil law jurisdictions normally only provides for suspension or modification of a contract rather than its termination. It is, therefore, necessary to consider the particular law in the relevant country to determine its effect. In France, for example, football contracts are framed by law pursuant to the Sports Code as well as the Labour Code and are known as ‘specific fixed-term contracts’.<sup>1620</sup> One of the grounds for termination is force majeure and this might apply to the COVID-19 pandemic, particularly as, in France, the 2019–20 season was initially ended by government decree, although this decision was later reversed. In the circumstances, the crisis can only be considered temporary and force majeure would only lead, at best, to a suspension of employment.

Spanish law allows for clubs to use the ERTE (expediente de regulacion temporal de empleo), which is contained in the Statute of Workers and applies in situations of force majeure.<sup>1621</sup> The ERTE allows the employer to request either a temporary modification of the contract reducing the working hours and salary by a minimum of 10% to a maximum of 70%, or to temporarily suspend the employment contract.<sup>1622</sup>

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<sup>1618</sup> Lawinsport (n 1555) 17.

<sup>1619</sup> See *Tsakiroglou and Co Ltd v Noblee Thorl GmbH* (1962) AC 93. *National Carriers Ltd v Parolpina (Northern) Ltd* (1981) AC 675. Court decisions suggest that it is not easy for a party to rely on the doctrine of frustration.

<sup>1620</sup> Lawinsport (n 1555) 20.

<sup>1621</sup> *Ibid* 30.

<sup>1622</sup> *Ibid*.



Under German law, suspension of a player's salary is not allowable and it is suggested that it is most unlikely that the Federal Labour Court (Bundesarbeitsgericht) would permit a club not to have to pay a player's wage, although bonuses for playing or winning a game could be suspended.<sup>1623</sup> In the Netherlands, a change of salary is only possible as a final option and only if negotiations at both the collective and individual levels have tried but failed to elicit agreement.<sup>1624</sup> Belgium law provides for force majeure clauses to allow suspension but not termination of an employment contract.<sup>1625</sup>

A pandemic was not something that clubs generally considered when player contracts were drawn up. The vast majority would therefore not have contained any clause which covered the situation if matches could not be played or, if played, took place without spectators being present. Thus, when the pandemic arrived it was perhaps not surprising that players did not show a great desire to deviate from their contracts and agree to a reduction in wages. Some clubs were able to negotiate a deferment of a percentage of player wages but this only delayed the payment with it still being an expenditure that has to be paid eventually paid.<sup>1626</sup> Only Arsenal in the EPL was able to negotiate a reduction in pay of 12.5% with their players for a period of 12 months.<sup>1627</sup>

Another example of players standing by their original contractual terms can be seen in the situation that arose with some players not being prepared to extend their contracts beyond 30 June 2020 to enable them to represent their team in the backlog of fixtures to complete the elongated season. Lyle Walker of Championship side, Charlton Athletic, took this approach as he hoped to secure a contract with a major club for the following season and did not want to jeopardise his chances by injuring himself in matches played after the expiration of his contract on 30 June.<sup>1628</sup>

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<sup>1623</sup> Ibid 24.

<sup>1624</sup> Ibid 9.

<sup>1625</sup> Ibid.

<sup>1626</sup> In the EPL, players from Southampton, West Ham United, Sheffield United, Aston Villa and Watford agreed to wage deferrals. See 'Watford join Premier League clubs to agree player wage deferral', *Yahoo Sports* (Web Page, 23 April 2020) <<https://sports.yahoo.com/watford-join-premier-league-clubs-agree-player-wage-204009491--sow.html>>.

<sup>1627</sup> Mokbel (n1584) 1. The agreement was subject to the club repaying the 12.5% reduction if the club was to qualify for the next season's Champions League as well as providing each player with a £100,000 bonus. Further, if the club qualified for the Europa League it was agreed that the reduction would only be 7.5%.

<sup>1628</sup> Tony Banks, 'EFL pass new rule on out-of-contract Championship stars in boost to clubs like Charlton', *The Express* (online at 3 June 2020) <<https://www.express.co.uk/sport/football/1290519/Championship-news-EFL-new-rule-out-of-contract-players-Charlton-Lyle-Taylor>>. See also 'Lyle Taylor: Charlton striker "having

Bearing in mind what has happened as a result of the pandemic, clubs should consider the inclusion of a clause in future player contracts which provides for a percentage reduction in wages if matches have to be postponed or played without spectators being present due to an unforeseen disruption. Setting the rate of reduction would not be an easy task but clubs should be able to agree a reasonable percentage if they consider the issue when the contract is being negotiated.

Although EPL clubs apart from Arsenal did not embrace wage cuts, opting instead for wage deferrals, other European national leagues had greater success with the clubs in the Bundesliga<sup>1629</sup> and Serie A<sup>1630</sup> agreeing to 20% and 33% reductions, respectively. In Spain, players and coaches at Barcelona and Atletico Madrid agreed to 70% cuts<sup>1631</sup> and in France a sliding scale was introduced starting at 20% but with those earning more than €100,000 per month facing 50% cuts.<sup>1632</sup> In other sports too, reductions were agreed with the players. In Australia, for instance, the Rugby Union and AFL players agreed on wage reductions of 60% and 50%, respectively.<sup>1633</sup>

In future, it will be a matter of negotiation between the club and the player as to whether a percentage reduction clause, if any, is included in their contract. However, some players have been prepared to agree a 70% pay cut even though their current contract did not provide for

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sleepless nights” after refusing to play for club over concerns of scuppering move’, *Sporting Life* (Web Page, 4 June 2020) <<https://www.sportinglife.com/football/news/i-might-be-called-a-money-grabber/180520>>.

<sup>1629</sup> ‘Coronavirus: Bayern Munich, other German Bundesliga clubs, take pay cut’, *The Straits Times* (online at 25 March 2020) <<https://www.straitstimes.com/sport/football/coronavirus-bayern-munich-other-german-bundesliga-clubs-take-pay-cut>>.

<sup>1630</sup> Chloe Beresford, ‘Serie A agrees to cut pay for playing staff, with League hoping to return to action in June’, *Forbes* (Web Page, 9 April 2020) <<https://www.forbes.com/sites/chloeberesford/2020/04/09/serie-a-wage-pay-cut-players-return-june-juventus/>>. It was agreed that the reduction would be cut by 50% if the Serie A season was able to be completed. Juventus had already agreed to reductions with their players before this agreement was reached. See ‘Juventus players waive four months’ wages due to coronavirus outbreak’, *The Guardian* (online at 29 March 2020) <<https://www.theguardian.com/football/2020/mar/28/juventus-players-wages-coronavirus-serie-a>>.

<sup>1631</sup> ‘Coronavirus Outbreak: LaLiga side Valencia announce pay cut to survive COVID-19-induced economic crisis’, *FirstPost* (Web Page, 21 April 2020) <<https://www.firstpost.com/sports/coronavirus-outbreak-laliga-side-valencia-announce-pay-cut-to-survive-covid-19-induced-economic-crisis-8281981.html>>. Valencia did not give details of the pay cut agreement.

<sup>1632</sup> ‘French footballers strike deal to reduce wages’, *SportStar* (Web Page, 8 April 2020) <<https://sportstar.thehindu.com/football/french-football-pay-cut-ligue-1-coronavirus-reduce-wages-france-covid-19/article31285635.ece>>.

<sup>1633</sup> ‘Coronavirus: Australian rugby players agree 60% pay cut until October’, *The Independent* (online at 20 April 2020) <<https://www.independent.co.uk/sport/rugby/rugby-union/international/australia-rugby-coronavirus-pay-cuts-a9474021.html>> and Michael Gleeson, ‘How will AFL player pay cuts work – and will they change the game?’, *The Age* (online at 15 April 2020) <<https://www.theage.com.au/sport/afl/how-will-afl-player-pay-cuts-work-and-will-they-change-the-game-20200401-p54fzz.html#>>.

any reduction at all. In the circumstances, it seems likely that a clause in a contract agreeing to a 70% reduction if matches are either not played or are played without spectators would probably be acceptable to players. This 70% reduction could be reduced to say 50% if matches were broadcast and a model similar to the French sliding scale referred to above could also be used to allow for smaller percentage cuts for those players on lower wages. To be fair the percentage figure needs to take into account what income the club is actually receiving and what income the player needs for his basic living expenses.

### *11.7 Conclusion*

The COVID-19 pandemic has caused considerable financial upheaval for European football. With the income of clubs substantially curtailed, UEFA had no alternative other than to suspend its FFP Regulations because clubs were clearly not able to comply with them. Of major concern is the long-term financial effects on the viability of clubs, particularly some of the smaller ones reliant on gate receipts, as the COVID-19 pandemic continues unabated in Europe, causing government restrictions requiring, inter alia, football matches to be played without spectators. It is not possible at this time to comment on the severity of the problem. This will only be feasible when the pandemic is brought under control allowing current restrictions to be lifted.

The COVID-19 pandemic has also raised the issue of other possible unforeseen disruptions occurring and the need for organisations like UEFA to prepare for them. The three other examples seen as possible major unforeseen disruptions from UEFA's perspective are war, terrorism and climate change. Each was examined and it was found in all cases that UEFA had taken steps to deal with any immediate issues and had flagged the need with its stakeholders to take these possibilities seriously. However, this, although commendable, is not sufficient, as contingency plans need to be established to prepare for possible disruptions. UEFA is dependent on its competitions for its income and the clubs are also dependent on prize-money as part of their income so that they can meet their commitments to the FFP Regulations and remain financially viable. It is, therefore, crucial that the contingency plans, adopted for each of the possibilities considered, focus on the continuation of football and UEFA's competitions, provided that these can be conducted in a safe manner.

UEFA's efforts in handling the problems caused by the COVID-19 pandemic have been praiseworthy. They assisted with the completion of the 2019–20 national league seasons

safely, organised the final rounds of their 2019–20 competitions satisfactorily and supervised the start of the 2020–21 national league seasons well. Although a certain amount of catching-up needed to be done due to the delays in completing the 2019–20 seasons, UEFA was able to complete its competitions quickly and efficiently, allowing the 2020–21 seasons to start only four weeks late. This late start will be absorbed into the normal 10 months' league seasons permitting clubs to end their seasons in May 2021 as usual. UEFA also suspended the FFP Regulations for the 2020 season, requiring clubs to submit two sets of accounts in 2021 and to utilise losses sustained as a result of the COVID-19 pandemic in preparing their breakeven figures.

Moving forward, UEFA needs to focus on the continuity of football through the national leagues and its competitions. It also needs to show patience and flexibility in dealing with its stakeholders generally and, in particular, the clubs in relation to the FFP Regulations. It is important that UEFA requires the clubs to submit their accounts to cover their returns for 2020 and 2021 because a further suspension of the breakeven provision of the FFP Regulations will provide too long a period without monitoring and could provide clubs with the opportunity to disregard the rules. Further, it is imperative that UEFA carefully monitors those clubs with wealthy owners, who might seek to take advantage of the more relaxed monitoring arrangements. UEFA has a difficult task ahead as it seeks to reintroduce its FFP Regulations fairly and assist European football with its recovery from the effects of the COVID-19 pandemic.

## CHAPTER 12: CONCLUSION AND RECOMMENDATIONS

### *12.1 The Background*

Professional team sports are different to other businesses, as discussed in Chapter 2. There is an interdependence between competing clubs which does not apply to other enterprises. Clubs require other clubs to provide them with opposition to create their marketable product. They need each other to be financially viable so that each club can complete their competition fixtures and also, where possible, provide competitive games to engage the interest of their customers.

Restrictions are often introduced to competitions with the aims of increasing competitive balance and producing more exciting games. As discussed in Chapter 3, it is important, when deciding on the type of restrictions to apply, that the particular factors relating to the competition under review are taken into account. In some competitions a combination of restraints are used to produce the most effective result. The NFL in the US and the AFL in Australia are good examples. However for European football the restraints used in other competitions do not appear to be suitable.

As discussed in Chapter 4, UEFA is a representative body acting for 55 national associations. Its aim is to look after the interests of European football at all levels of the game and to develop and maintain unity and consensus among its stakeholders. Like other similar representative bodies it has imposed limitations on its member organisations to protect and enhance European football.

### *12.2 Introduction of the FFP Regulations*

UEFA introduced the FFP Regulations in 2010 as an addition to the original 2003 Club Licensing Regulations. The purpose of the FFP Regulations, as discussed in Chapter 5, was to bring financial stability to European football. They contained tougher measures to ensure club debts were paid more punctually and also introduced the breakeven provision which required clubs to spend no more than they earned. Further, the new measures were monitored much more closely than previously, and by UEFA itself, to establish compliance.

The FFP Regulations did not seek radical change to the situation in European football at that time, which meant that their acceptance by stakeholders and clubs, particularly the wealthy and influential ones, was an attainable goal. They introduced simple accounting principles

which were relatively easy to comprehend and could be uniformly applied in and by each of the national associations.

European Competition Law (ECL) encourages competition and prohibits arrangements which seek to restrict, prevent or distort competition. The FFP Regulations place some financial restrictions on clubs to ensure their financial viability and protect the competitions in which they are involved. Although the unique nature of sport is recognised in Article 165 of the *TFEU*, that does not provide sporting bodies with an exemption from ECL. The result is that the FFP Regulations have the potential to breach ECL which underlies the four core questions examined in this thesis.

### *12.3 Thesis Question 1: Do the FFP Regulations fulfil the Objectives and Values of UEFA?*

#### *12.3.1 Implementation*

UEFA ensured that its stakeholders supported the FFP Regulations before they were introduced. It also gained the support of the European Commission, a particularly useful ally to have if and when the FFP Regulations were challenged. Clubs had the opportunity to become conversant with the FFP Regulations before they were introduced and they were phased in over several seasons to avoid any unnecessary disruption. Their careful implementation appears to have been relatively successful. Only two court proceedings, by Striani and the PSG supporters, were commenced but both were discontinued before final hearings. In several cases before CAS, the FFP Regulations per se have not been criticised and in the *Galatasaray* case the Panel found that the FFP Regulations did not breach European Competition Law.

#### *12.3.2 Success of the FFP Regulations*

Data from UEFA following the introduction of the FFP Regulations has repeatedly depicted a decrease in the size of club debt. The results also show the revenue of clubs generally increasing and the operating costs of clubs usually decreasing. There has been no criticism of UEFA's data and no contrary data has been produced by critics of the FFP Regulations. Thus, UEFA's specific objectives appear to have been met. The FFP Regulations have improved club debt levels and have clubs operating within their means, which has brought rationality to clubs' finances and protected the long-term viability of European football. The FFP Regulations also appear to have met UEFA's general objectives and values by safeguarding its competitions, which provide the income for it to conduct its business effectively and

ethically whilst looking after all levels of European football and protecting the interests of its stakeholders.

### *12.3.3 Criticism of the FFP Regulations*

Particularly when they were first introduced, the FFP Regulations attracted considerable criticism from commentators. This was based on forecasts or predictions as to their likely impact, which did not have as much effect in practice as was expected.

Criticism also arose because the FFP Regulations did not assist in the provision of competitive balance. However, this was never the intention of the FFP Regulations. They were to provide financial viability for clubs.

The use of the term ‘fair play’ was also criticised as the FFP Regulations did not promote this in the form of competitive balance. UEFA, however, was looking at ‘fair play’ from a financial rather than a competitive balance perspective. It was concerned that clubs should not be basing their success on failing to pay their debts or on using investor income not derived from football.

The other major criticism of the FFP Regulations was that they merely retained the ‘status quo’. This was linked to the lack of investment opportunities available to clubs. UEFA obviated this issue to a great extent by introducing the voluntary agreement in 2015.

Despite the criticisms, the FFP Regulations have achieved their aim of financial stability. Most of the criticisms were unwarranted. However, maintenance of the ‘status quo’ was a valid criticism and UEFA skilfully handled it by introducing the voluntary agreement.

### *12.3.4 Governance issues*

As discussed in Chapter 7.4, the FFP Regulations would benefit from an internal review with several modifications being made to make them more effective and clearer. Openness and transparency are vital to a representative body like UEFA and it needs, through its independently run body, the CFCB, not only to operate fairly but to be seen to operate fairly. It needs to ensure it cannot be accused of favouring one club over another. UEFA also needs to ensure that all clubs abide by the FFP Regulations and must give itself every opportunity to establish that this is the case. If clubs form the view that some of their number are not complying with the FFP Regulations then respect for the integrity of UEFA will diminish.

## *12.4 Thesis Question 2: Do the FFP Regulations comply with Articles 45, 101(1) and 102 of the TFEU?*

### *12.4.1 Difficulties in Assessment*

The potential impact of ECL on the FFP Regulations is hard to assess with accuracy for three reasons. First, there have not been a large number of sports cases considered by the ECJ and those that have, have tended to relate to a precise aspect of a particular sport. Secondly, sports cases do not always have a purely economic aspect to them which makes it challenging to apply legislation which tends to be economically focused. Thirdly, although the European Union has acknowledged 'the specific nature of sport' the wording of Article 165 of the Lisbon Treaty (2007) is, to a large extent, general and vague, making it difficult to determine how the ECJ would interpret it. Having said that, by considering the case law and the guidelines provided by the European Commission, it is possible to form a reasoned opinion as to how the ECJ would deal with the situation. It is likely that they would not invalidate the FFP Regulations for the reasons given below.

### *12.4.2 Article 45, 101(1) and 102 of the TFEU*

Article 45 deals with the free movement of workers within the European Union. It is likely that the ECJ would determine that the FFP Regulations only breach Article 45 to a very limited and indirect extent and, as discussed in Chapter 6.9 and Chapter 8.3, that they meet the conditions utilised in the *Gebhard* case as being non-discriminatory, suitable, necessary and proportionate.

Article 101(1) prohibits bodies from making agreements that have as their object or effect the prevention, restriction or distortion of competition. Although it is arguable, as discussed in Chapter 6.3 and Chapter 8.4, that the FFP Regulations do not restrict competition by 'object', it is likely the ECJ would determine that the FFP Regulations restrict competition by 'effect,' if only to a minor extent. However, this would mean that the FFP Regulations would be illegal unless the Article 101(3) exemption and/or the ancillary restraint exception apply.

Article 102 was introduced to help control monopolies within the internal market from restricting competition. The key words to the Article are 'dominance' and 'abuse'. While it is probable UEFA would be held to have a dominant position in the market it is less likely it would be found to have abused its position through the FFP Regulations. In the circumstances, Article 102 would be unlikely to apply. Consequently, Article 102 would probably have no impact on the validity of the FFP Regulations.



It therefore appears that the FFP Regulations may breach Article 101(1) but they are unlikely to breach Articles 45 or 102.

### *12.5 Thesis Question 3: Do the Article 101(3) and/or the Ancillary Restraint Exemptions Apply?*

As discussed in Chapter 9, the Article 101(3) and ancillary restraint exemptions could be applied by the ECJ if it considers they are appropriate, and it is likely that both exemptions would apply to the FFP Regulations and their potential to breach Article 101(1).

**Article 101(3) exemption:** Article 101(3) provides an exemption to Article 101(1) where the economic benefits of the agreement outweigh the restrictions on competition, as discussed in Chapter 6.4 and Chapter 9.2. Since the FFP Regulations only restrict competition minimally and the benefits of financial stability which they provide can be established, it is probable the exemption would apply. In making its decision, the ECJ would consider whether there is any less restrictive or better way in which financial stability can be achieved but, as discussed in Chapter 9.4, there do not appear to be any better or less restrictive alternative(s). The Article 101(3) exemption is, therefore, likely to apply to the FFP Regulations and validate them from an Article 101(1) perspective.

**The ancillary restraint exemption:** Unlike Article 101(3), the ancillary restraint exemption considers the matter from a public interest perspective. This exemption, originally applied in *Wouters*, is administered in a similar way to Article 101(1) as the conditions in *Gebhard* are applied to Article 45. As discussed in Chapter 6.5 and Chapter 9.3, it is likely the exemption would apply to the FFP Regulations as they are a necessary, suitable and proportionate way to deal with the issue of financial stability. As is the case with Article 101(3), the ECJ would almost certainly determine that there are not any better or less restrictive ways in which UEFA's objective could be achieved. In the circumstances, it is likely the ECJ would apply the exemption and not use Article 101(1) to invalidate the FFP Regulations.

**The alternative restraints:** The alternative restraints, as discussed in Chapter 3 and Chapter 9.4, do not provide financial stability to the same extent as the FFP Regulations and the major options, including salary cap, revenue sharing and luxury tax, would cause greater difficulties in regard to implementation, stakeholder acceptance and ECJ endorsement than the FFP Regulations. Thus, it is doubtful they would be viable alternatives to the FFP Regulations.

In summary, both the Article 101(3) and the ancillary restraint exemptions are likely to apply to the FFP Regulations and the ECJ would, therefore, in all probability, determine that the FFP Regulations do not breach Article 101(1).

#### *12.6 Thesis Question 4: How important is Competitive Balance and what are UEFA's Options moving forward?*

##### *12.6.1 Importance of Competitive Balance to European Football*

Competitive balance is not as important to European football as it is in some other sports and their competitions which require close competitive games to ensure spectator interest. As discussed in Chapter 10.4, European football has other aspects to its competitions, such as promotion and relegation, contesting for places in the UEFA competitions and other national cup competitions, which other sporting events do not have. However, competitive balance cannot be completely ignored as it is important that the financial differential between the top clubs and the lower clubs does not become too great. There is also concern among some of the lower-tier clubs that they are not receiving a reasonable opportunity to compete against the wealthy clubs. Some steps, therefore, need to be taken in the areas of finance and opportunity. There needs to be a greater redistribution of funds from the wealthy clubs to lower-tier ones and more opportunities need to be afforded to the lower-tier clubs.

##### *12.6.2 Available Options*

One option UEFA should consider, as discussed in Chapter 10.4, is to increase the size of the solidarity payment which is derived from their competition income. Two other possibilities it should examine, as discussed in Chapter 10.7, are a luxury tax on wages and a luxury tax on transfers. Either or both would be useful to further enhance the solidarity fund and allow UEFA to assist and develop the lower levels of European football.

UEFA has also established UEL2 to commence in 2021 to increase opportunities for clubs in UEFA competitions, but in fact it only increases the number of clubs playing in its competitions by 16. As discussed in Chapter 10.5, UEFA needs to consider widening the scope of UEL2 to allow for more new clubs to enter its competitions or consider a new UEL3 competition to cater for that. A new competition could give a significant number of additional clubs the opportunity to compete in a UEFA competition with the chance to increase their income from matches played. It may not contribute significantly to solidarity fund income, but its main aim would be to provide European competition football to clubs just below the top level.

There are other hybrid options, discussed in Chapter 10.7, that UEFA could examine which may provide more money for the solidarity fund, or more opportunity for the lower-ranked clubs or both. UEFA could reduce squad sides for their competitions, which could potentially free up some players to play for other clubs. It could also place a cap on the number of players that a club can have contracted at one time. This could be achieved by having a fixed cap with a tax/penalty if clubs breach the cap. UEFA could also consider placing a cap on the number of players that clubs could loan or loan out. Alternatively, UEFA could consider placing a tax on player loans, which could provide solidarity funding. These hybrid options have the potential to add income to the solidarity fund and make the playing talent more readily available to some of the lower-tier clubs rather than being exclusively controlled by the wealthy clubs, as is generally the case currently.

### *12.6.3 Establishment of a European Super League (ESL)*

As discussed in Chapter 10.6, UEFA should investigate the introduction of an ESL. This would take the top European clubs from their national leagues and place them in their own UEFA-run competition. It would have the benefit of potentially making the top five national leagues in Europe more competitively balanced by taking the better teams from those leagues and leaving teams of a more equal standard in them. However, a paradoxical situation could arise in that the new ESL would attract major financial and media interest, which would mean that the clubs in the ESL would grow financially and the gap between those clubs and the rest of European football would widen even further than it is now. In the circumstances, the concept of an ESL should only proceed if there is unanimity of consent for it and the solidarity payment percentage is at a sufficiently high level to prevent the financial gap between the ESL clubs and the remainder from widening further.

### *12.6.4 Selection of Options*

UEFA will need to select its choices from the options carefully and it is important that it secures stakeholder support to its chosen course(s) of action. Unity amongst stakeholders is vital in UEFA's quest to protect and enhance the interests of European football. In particular, as discussed in Chapters 4.5, 7.3 and 10.7, it is essential that UEFA maintains the support of the top clubs.

## *12.7 Thesis Question 5: What are the Ramifications of Unforeseen Disruptions (such as COVID-19) on the FFP Regulations and European Football generally?*

### *12.7.1 UEFA's Reactions to the COVID-19 Pandemic*

To date, UEFA has done a good job in managing the COVID-19 pandemic, as discussed in Chapter 11.6. It has worked well with its stakeholders to ensure the continuance of European football in a safe manner. In addition, UEFA has taken steps to alleviate clubs' concerns in meeting their FFP Regulation requirements in the short-term. However, it may find its task becomes more difficult as the extent of the pandemic and its effect on clubs becomes more evident. It may have to provide further assistance to clubs in their quest to meet the requirements of the FFP Regulations but, at the same time, it needs to be aware of the possibilities of clubs seeking to take advantage of the relaxation in the FFP Regulations.

### *12.7.2 Contingency Planning*

Contingency planning for future unforeseen disruptions, whether they be pandemics, the actions of terrorists, the outbreak of war or the results of climate change, needs to be considered by UEFA. This will place UEFA in the best position possible to deal with such events, should they occur, from both a FFP Regulations' perspective and generally. It also needs to do this through consultation not only with its stakeholders but also with specialist groups, national and regional governments, international bodies and other experts. Furthermore, any such plans need to be updated on a regular basis to incorporate the very latest information, strategies and technology.

## *12.8 Recommendations*

While the FFP Regulations have gone a considerable way towards ensuring financial stability, there are additional measures and refinements that could be implemented to enhance their benefits for European football.

It is recommended that UEFA:

1. Continues to apply the FFP Regulations;
2. Amends the FFP Regulations to cover the governance issues discussed in Chapter 7.4;
3. Increases, with the approval of its stakeholders, the percentage share of the solidarity payment derived from its competition income;
4. Considers the possibility of a luxury tax on player transfers and/or wages to enhance the solidarity fund;

5. Reviews the size of playing squads, the number of contracted players attached to clubs and the number of player loans;
6. Establishes a new UEL3 competition or explores alternative ways to allow more clubs to partake in its competitions;
7. Examines the possibility of establishing a European Super League and determine how it might relate to other competitions to avoid adverse consequences; and
8. Prepares detailed contingency plans with input from stakeholders, experts and others for future possible unforeseen disruptions.

Each of the above recommendations could further assist UEFA and European football generally to ensure the ongoing financial and operational viability of the game which can only be for the benefit of the national associations, the clubs, the players, the supporters and the game generally.

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