UEFA FINANCIAL FAIRPLAY REGULATIONS AND EUROPEAN UNION ANTITRUST LAW COMPLICATIONS

INTRODUCTION

European Football[1] is not just a sport to the rest of the world. Each match is more than just a game. A match can and has represented old battles that never die completely. The Celtic–Rangers rivalry is more than a cross-town rivalry, but a representation of the unfinished political fight over the Protestant Reformation.[2] The Barcelona–Real Madrid rivalry represents a long-running nationalist fight between Castilian and Catalonian Spaniards.[3] Celtic's long running rivalry with Rangers Football Club (FC) is just another part of the centuries-old rivalry between Northern Irish Catholics and Protestants.[4]

While one's club is a representation of his or her nation and tribe, it is also a business, as shown by the globalization of the sport.[5] And just like any business, occasionally there are financial issues. Just look at Rangers FC, where mismanagement and overspending forced the club to go into administration and then liquidate in 2012.[6] To keep up with its traditional rivals, Glasgow Celtic, the Rangers have consistently spent more on players

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1 European Football is known as soccer in America. This article will call soccer "football" for the length of the article.

2 FRANKLIN FOER, HOW SOCCER EXPLAINS THE WORLD 42 (2004).

3 *See id.* at 200–03.

4 *See id.* at 36, 57.

5 *See* Corporate Information, LIVERPOOLFC.COM, http://www.liverpoolfc.com/corporate/directors (last visited Oct. 22, 2013); Tony Karon, *What Soccer Means to the World*, TIME (July 21, 2004), http://content.time.com/time/arts/article/0,8599,671302,00.html. Chelsea FC is owed by a Russian billionaire, Roman Abramovich, while Liverpool is owned by Fenway Sports Groups. Team compositions have become more global; no longer are teams filled with players from the nation the league takes place in, but with players from around the world. *Id.*

6 C.S.W., *You don't know what you've got 'til it's gone*, THE ECONOMIST (July 13, 2012), http://www.economist.com/blogs/gametheory/2012/07/glasgow-rangers'-bankruptcy. Liquidation and administration is the process a company undergoes in the UK if the company is going bankrupt. Administration is the process in which, after the directors of the company decide the business is insolvent, the court appoints a person in charge for the interim. Liquidation is the next step and is the process of winding up a company's financial affairs. The company's assets will be used to pay off creditors. Jill Treanor, *Explainer: options for companies in financial difficulties*, THE GUARDIAN (Jan. 5, 2009), http://www.theguardian.com/business/2009/jan/05/recession-retail; Samuel Barber, *Do you know the difference between a company in administration, receivership and liquidation*?, BUS. LAW TODAY (July 29, 2013), http://www.businesslawtoday.com.au/corporations-law/company-in-administration-receivership-and-liquidation/.

than the club could afford on its payroll.[7] Between 1999 and 2010, the club lost an average of £13 million per season.[8] Rangers sustained these considerable losses by counting on qualifying for UEFA Champions League each year.[9] However, an upset in the 2008/2009 season caused the club to lose a £10 million payout, since the Rangers would not receive the financial benefits of competing in the Champions League.[10] To further compound its financial issues, the club management's ill-advised scheme to reduce the club's tax liability unraveled, and Britain demanded £21.4 million in back taxes.[11] This was enough to push the Rangers into insolvency. The club entered administration, resulting in liquidation.[12] Rangers FC's business and assets were sold to a new company and the Rangers in the 2012/2013 season were no longer one of the two premier clubs in Scotland, but instead a club in Scottish League One, the third tier of the Scottish Professional Football League.[13]

Lately, this has not been an unusual story in European football. Valencia Club de Fútbol (CF), a Spanish team, which won La Liga, the Spanish top tier league, and reached the Champions League final twice in the early 2000's, fell into terrible financial trouble, owing €547 million during the 2009/2010 season.[14] Again, this huge debt originated from a mix of bad management decisions and overspending.[15] Valencia CF bought several players who would never play a significant role on the team for an average of €17 million each,

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7 C.S.W., *supra* note 6.

8 *Id.*

9 *Id.* The Champions League is an annual continental club football competition organized by the Union of European Football Associations (UEFA) for the best thirty-two teams in Europe. Champions League football is considered one of the most prestigious tournaments in the world. UEFA Champions League Competition Format, UNION OF EUR. FOOTBALL ASS'NS, http://uefa.com/uefachampionsleague/season=2015/competitionformat/index.html.

10 C.S.W., *supra* note 6.

11 *Id.* Between 2001 and 2010, Rangers FC routed £48 million to eighty-seven players and staff through trust funds held by a British bank. The British government considers these types of payments loans, unless the transfers are incorporated into player contracts when the government considers these payments salaries, half of which is taxable for high-income workers, the football players. *Id.*

12 Jim Worstall, *Rangers Bankruptcy: This is What Happens to Companies That Rely on Human Capital*, FORBES (Feb. 18, 2012, 7:21 AM), http://www.forbes.com/sites/timworstall/2012/02/18/rangers-bankruptcy-this-is-what-happens-to-companies-that-rely-on-human-capital/; *Douglas Fraser, Rangers' liquidation Q&A*, BBC NEWS (June 12, 2012, 4:05 PM), http://www.bbc.co.uk/news/uk-scotland-glasgow-west-18418513.

13 Fraser, *supra* note 12.

14 Conor Queenan, *5 Reasons Why Valencia CF Are Set to Win Another La Liga*, BLEACHER REP. (Dec. 21, 2011), http://bleacherreport.com/articles/993301-5-reasons-why-valencia-cf-are-set-to-win-another-la-liga; Sid Lowe, *Valencia's Debts Threaten the Very Existence of the Club*, WORLD SOCCER (2008), http://www.worldsoccer.com/uncategorized/valencias-debts-threaten-the-very-existence-of-the-club-writes-sid-lowe.

15 Lowe, *supra* note 14.

paid £30 million on severance payments to managers, and began to build a new stadium before selling the grounds of the old stadium.[16]

Rangers FC and Valencia CF are not at all atypical. Clubs with financial issues became a common theme in the last decade.[17] By 2011, 63% of clubs in the top tiers had an operating loss in the 2011 Financial Year.[18] Together, these clubs had an operating loss of €388 million.[19] Fifty-Five percent of clubs had an operating loss of €1.675 million.[20] Finally, 38% of clubs reported a negative net equity in 2011.[21]

The Union of European Football Associations (UEFA), the administrative body for football, in Europe, observed this problem and approved Financial Fair Play Regulations (FFP) to fix these financial issues.[22] FFP intends to introduce rationality and stabilize the financial environment of European Club football.[23] UEFA's objective centered on preventing financial situations similar to Rangers FC and Valencia CF for the "game's well-being."[24]

As straightforward and valid as the objectives of UEFA were in creating FFP, the structure of FFP makes the regulation illegal under the European Union's competition law. On May 6, 2013, Daniel Striani, an agent, who represents football players, represented by lawyer Jean-Louis Dupont, lodged a complaint with the European Commission against UEFA's FFP regulations, and later lodged a second legal challenge in the Court of First Instance in

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16 *Id.* In part, the global economic crisis contributed to Valencia FC's financial troubles. Valencia FC began to build the new stadium. Before selling the grounds of the old stadium the housing bubble burst, leaving the club unable to find a buyer. Valencia FC counted on selling the old stadium grounds to pay for the new stadium. *Id.*; Dermot Corrigan, *Varona: Valencia not for sale*, ESPN FC (Apr. 4, 2013), http://espnfc.com/news/story/_/id/1398925/varona-assures-fans:-valencia-not-for-sale?cc=5901.

17 *See generally* UNION OF EUR. FOOTBALL ASS'NS, THE EUROPEAN CLUB LICENSING BENCHMARKING REPORT FINANCIAL YEAR 2011 115 (2011) [hereinafter BENCHMARKING REPORT], http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/91/61/84/1916184_DOWNLOAD.pdf.

18 BENCHMARKING REPORT, *supra* note 17, at 101. The year 2011 is used for statistics because it is the last year before the FFP went into effect. UNION OF EUR. FOOTBALL ASS'NS, *Financial Fair Play*, http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/index.html (last updated Nov. 5, 2014).

19 BENCHMARKING REPORT, *supra* note 17, at 101.

20 *Id.* at 105; Stefan Szymanski, *European football will never be the same again*, FINANCIAL TIMES (Aug. 18, 2013, 4:50 PM), http://www.ft.com/intl/cms/s/0/a13db70c-05d7-11e3-8ed5-00144feab7de.html#axzz2fl62VaJN.

21 BENCHMARKING REPORT, *supra* note 17, at 115.

22 *Financial Fair Play*, *supra* note 18.

23 *Id.*

24 *See id.*

Brussels.[25] Although the full FFP regulations will not be implemented until 2015,[26] the predicted effect of FFP on the player market and competition between teams clearly violates EU competition law. This Comment will explore the multiple ways that FFP violates EU competition law, and offer a way for UEFA to achieve the objectives of FFP without violating EU competition law.

This Comment is structured in five parts. Part I gives a general overview of how European football is structured, why clubs risk overspending, the Financial Fair Play Regulations, and the lawsuit against UEFA by Mr. Striani. Part II will give a brief overview of the antitrust framework FFP Regulations will be tested against. Part III discusses exactly how FFP violates EU competition law under Article 101 of the Treaty on the Functioning of the European Union (TFEU). Part IV discusses how FFP violates EU competition law under Article 102 of the TFEU. Finally, Part V will suggest alternatives to FFP. This Comment will argue that the FFP Regulations are illegal under both Article 101(1) and Article 102 of the TFEU.

I. General Overview of European Football and the New FFP Regulations

The way football is structured is very different than American sports, therefore this Comment will give a brief background of how European football is structured for context. The way European Football is structured influences the way club owners decide to spend money, and this Comment will explain why. Next, this Comment will explain in depth the Financial Fair Play Regulations, and the lawsuit against UEFA by Mr. Striani.

A. How European Football is Structured

The way FFP affects football is dependent on how football is structured, both its regulatory body and league structure. A quick overview of football's regulatory body and league structure will be given for context to understand how FFP Regulations will affect the clubs and leagues.

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25 David Conn, *Players' agent launches legal threat to UEFA financial fair play rules*, The Guardian (May 6, 2013), http://www.theguardian.com/football/2013/may/06/agent-legal-threat-uefa-financial-fair-play; *Soccer agent takes legal action in financial fair play battle*, CNN International (June 20, 2013, 5:58 GMT), http://edition.cnn.com/2013/06/20/sport/football/uefa-financial-fair-play-bosman-football/index.html.

26 *UEFA delays Financial Fair Play Rules*, FourFourTwo (Mar. 2, 2010), http://www.fourfourtwo.com/news/uefa-delay-financial-fair-play-rules.

1. *Regulatory Body Structure*

The structure of football worldwide is strictly hierarchal, from the grassroots level to the elite level.[27] UEFA is one of six confederations in the Fédération Internationale de Football Association (FIFA), the international governing body of football.[28] UEFA is an administrative body that is responsible for running national and club competitions, and controls the prize money, regulations and media rights to those competitions.[29] This body is comprised of each nation's national football association, with a total of fifty-two associations.[30]

Each nation's football association is comprised of the nation's leagues and regional associations.[31] Each association is comprised of the nation's clubs, which are in turn formed by individuals.[32] This pyramidal structure is also reflected in the regulatory bodies of football, with FIFA at the top, a regional regulatory authority (such as UEFA) in the middle, and each country's Football Association at the bottom.[33] For example, in Great Britain, the top clubs created the Premier League, which is under the regulation of the Football Association (FA), and must submit to its rules and sanctions.[34] The FA in turn

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27 MATTHEW HOLT, UEFA, GOVERNANCE, AND THE CONTROL OF CLUB COMPETITION IN EUROPEAN FOOTBALL 10 (2009), *available at* http://www.sportbusinesscentre.com/wp-content/uploads/2012/08/UEFA1.pdf.

28 *The Organisation: Confederations*, FIFA.COM, http://www.fifa.com/aboutfifa/organisation/confederations/index.html (last visited Nov. 10, 2014).

29 *UEFA champions league revenue distribution*, UNION OF EUR. FOOTBALL ASS'NS (Sept. 15, 2014, 12:17 CET), www.uefa.com/uefachampionsleague/news/newsid=2146867.html; *see also UEFA Nations League: all you need to know*, UNION OF EUR. FOOTBALL ASS'NS (Dec. 5, 2014, 12:15 CET), www.uefa.com/community/news/newsid=2079553.html.

30 HOLT, *supra* note 27, at 15. While many of the national associations represent different nations, being a nation is not required to be a national association eligible to join UEFA. For example, the United Kingdom is not part of UEFA, but Northern Ireland, Wales, Scotland, and England are each national associations that are a part of UEFA. Additionally, Israel is part of UEFA instead of the Asian Football Conference due to the potential violent conflicts if Israel was to draw a Middle Eastern team. *See generally* James Montague, *Time is right for Israel to return to its Asian roots*, THE GUARDIAN (Feb. 27, 2008), http://www.theguardian.com/football/2008/feb/27/worldcup2010.

31 *Id.* at 10.

32 HOLT, *supra* note 26 at 10; *see also* THE FOOTBALL ASS'N, ARTICLES OF ASSOCIATION (2013–2014), *available at* http://www.thefa.com/~/media/Files/TheFAPortal/governance-docs/rules-of-the-association/2013-14/articles-of-association.ashx.

33 Pierre Ducrey et al., UEFA and Football Governance: A New Model 11 (June 30, 2003) (International Masters (MA) Final Project Work, Centre International D'Etude du Sport), http://kassiesa.net/uefafiles/2003-fifamaster-uefa-governance.pdf.

34 The Premier League is a private company owned by the twenty clubs who make up the League at that time. Additionally, the Football Association (FA) is a special shareholder in the Premier League. *Formal Relations*, PREMIER LEAGUE, http://www.premierleague.com/en-gb/about/formal-relations.html.

must submit to UEFA's control, which in turn must submit to FIFA's, the ultimate regulatory body, control.[35]

Through this hierarchal structure, the representative structure is based on the football associations; however, recently clubs have become more involved at the UEFA level through the European Club Association (ECA), and the European Professional Football Leagues.[36] Additionally, even though this structure is strictly hierarchical, clubs can choose to break away from UEFA or FIFA; the hierarchical structure of European football is currently governed by a memorandum of understanding that expired in 2014.[37] The likelihood of the clubs breaking away was always low, and ultimately they stayed.[38]

2. *League Structure*

The structure of the European leagues themselves is unlike anything in American sports. Unlike American sports, a team in the top league is not guaranteed will continue to play in the top league the next season.[39] For example, in Great Britain there are four leagues.[40] At the end of each season, the three teams with the worst record in the Premier League, the top tier in English football, are dropped to the second tier, the Championship League. The top two teams in the Championship League are promoted to the Premier League, with the third spot given to the winner of promotion playoffs between teams in third to sixth place, while the three teams with the worst record in the Championship League are dropped to League One, the third tier.[41]

This structure allows clubs who were on the top to sink to the bottom, while teams in lower leagues may rise to the top of the Premier League. For example, historically Leeds United, a strong team finished consistently in the

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35 *Formal Relations*, PREMIER LEAGUE, http://www.premierleague.com/en-gb/about/formal-relations.html.

36 *Who we are*, PREMIER LEAGUE, http://www.premierleague.com/content/premierleague/en-gb/about/who-we-are.html.

37 Matt Scott, *Top European clubs threaten to break away from Fifa and Uefa*, THE GUARDIAN (July 27, 2011), http://www.theguardian.com/football/2011/jul/27/European-clubs-breakaway-fifa-uefa.

38 *See id.*; Rob Hughes, *The Competing Demands of Soccer Clubs and FIFA*, N.Y. TIMES (Aug. 2, 2011), http://www.nytimes.com/2011/08/03/sports/soccer/03iht-LEAGUE03.html?pagewanted=all&_r=0. The Clubs could create another governing body, and another European league. *Id.*

39 Trey Jones, *When Pigs Fly: Regulation in College Football*, BLEACHER REP. (Mar. 13, 2009), http://bleacherreport.com/articles/138591-when-pigs-fly-regulation-in-college-football.

40 *Id.*

41 *See* Mike Steere, *Explainer: How Relegation Works*, CNN (May 18, 2009), http://edition.cnn.com/2009/SPORT/football/05/18/relegation.explainer/index.html.

top of the Premier League, however, within the past decade Leeds United dropped all the way to League One for several seasons.[42]

Additionally, depending where a club places in the highest league, the club may be eligible to play in competitions run by UEFA, which are played all across Europe. There are two tournaments: Champions League and Europa League, commonly known as European football. The number of clubs that may participate from each football association in these competitions is determined by a coefficient.[43] The coefficient determines which clubs may compete in the more prestigious Champions League or the Europa League.[44] To compete in these competitions, each club individually needs to be licensed by UEFA.[45]

B. Why Clubs Over-Spend

All clubs wish to compete in the more prestigious Champions League or Europa League. Clubs are very likely to risk overspending to achieve typical sporting prestige, and because of the financial incentives involved.[46] Winning begets money, which allows teams to sign up better players, which begets more winning. Losing consistently, by contrast, can have dire financial consequences. For example, Premier League teams' revenues were over £2 billion in comparison to Championship Clubs' revenues of just over £400 million.[47] If a team drops to Championship League, there is an average loss of £20 million in income.[48] There a 50% chance that the club dropped to the Championship League will not reach the Premier League again and a 30% chance that the club will drop to next lower league - League One.[49] Additionally, some have estimated that there is a £90–€150 million award for

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42 Jones, *supra* note 38.

43 *See* Press Association, *Uefa confirms plans to change Chapion League seeding system*, The Guardian (Oct. 10, 2014), http://www.theguardian.com/football/2014/oct/10/uefa-champions-league-seedings-change; *see also UEFA rankings*, UEFA.com, http://www.uefa.com/memberassociations/uefarankings/index.html (last visited Jan. 24, 2015).

44 Press Association, *supra* note 43.

45 *Id.*

46 See CULTURE, MEDIA AND SPORT COMMITTEE, FOOTBALL GOVERNANCE, 2010-12, H.C. 792-I., ¶ 77–78 (U.K.) [hereinafter FFP Regulations], http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf.

47 *Id.* ¶ 75.

48 *SportingIntelligence*, TWITTER (Apr. 25, 2014, 11:19 AM), https://twitter.com/sportingintel/status/459758654972256257/photo/1.

49 *Id.*

those clubs that earn a promotion to the Premier League, due to the increased TV money, attendance, and advertising.[50]

Also, clubs who compete in the Champions League, the equivalent of a regional World Cup for each country's club football teams, receive additional money.[51] For example, in the 2012/2013 season, Manchester United received £39.3 million for participating in the Champions League from the group stage to the round of sixteen, and Chelsea FC received £40.9 million after falling out of the Champions League during the group stage and advancing to the final and winning the Europa League.[52] The money the clubs receive from the Champions League is a mix of money for participating and from broadcasting revenues.[53] All clubs receive equal amounts for participating based on how far they proceed into the competition.[54] Clubs do not receive an equal amount of broadcasting money, which is based on the size of their country's population.[55] That means Manchester City from England received £18.7 million of the broadcasting money, while SC Braga from Portugal received only £1.5 million, despite competing in the same number of rounds.[56]

For most owners, the ability to receive these financial awards are a means to an end, the means to be able to win again and gain further club prestige.[57] If a club can overspend but reach the continental wide tournaments, such as the Champions League, many owners consider the risk well-worth taking, due to the huge increase in revenue and the prestige the club will gain.[58] After reaching the top league, there is pressure for a club to remain in the top league

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50 Parliament Report, *supra* note 46, ¶ 76; *Financial Fair Play takes hold*, IRISH EXAMINER (Aug. 11, 2014), http://www.irishexaminer.com/sport/soccer/financial-fair-play-takes-hold-279086.html.

51 *See* Ed Thompson, *Widening Gap between elite clubs and the rest*, FINANCIAL FAIR PLAY (Sept. 18, 2013), http://www.financialfairplay.co.uk/latest-news/widening-gap-between-elite-clubs-and-the-rest-.

52 *UEFA Prize Money-Rhapsody in Blue*, THE SWISS RAMBLE (May 7, 2013), http://swissramble.blogspot.co.uk/search/label/Chelsea. This money received by the clubs participating in UEFA's tournaments is from a combination of prize money based on participation and results, and share of the television money. The structure of the Champions League is to have a group stage, similar to the Group Stage in the World Cup, where a win is 3 points, a draw is 1 point and no points for a loss. After all games are played, the top two teams in each group advance to a knock out round called the group of sixteen, similar to the Sweet Sixteen in March Madness. The top third team in each group plays in the Europa League, the secondary European Club championship.

53 Thompson, *supra* note 51.

54 *See id.*

55 *Id.*

56 *Id.*; *see* UNION OF EUR. FOOTBALL ASS'NS, *UEFA Champions League: Distribution to Clubs 2012/2013* (2013), http://www.uefa.com/MultimediaFiles/Download/uefaorg/Finance/01/97/52/97/1975297_DOWNLOAD.pdf.

57 Parliament Report, *supra* note 46, ¶ 77.

58 *Id.* ¶ 77, 96.

and to reach its next goal of competing in these continental wide tournaments.[59] With this in mind, prestige and triumph becomes more of a priority than sound financial decisions.[60]

C. Financial Fair Play Regulations

Recognizing the priorities of the owners to reach the Champions League at any cost, and in light of many clubs reporting financial losses in a difficult economic market, UEFA became concerned with the ability of the clubs to keep their finances healthy.[61] These fears were magnified by the fact that in some clubs, such as Valencia CF, financial issues began to affect day-to-day operations.[62] In view of this situation, UEFA's Executive Committee in September 2009 approved the concept of financial fair play.[63] In May 2010, UEFA approved the UEFA Club Licensing and Financial Fair Play Regulations, and later updated the regulations in 2012.[64] UEFA stated six objectives it expected FFP to accomplish:

- to introduce more discipline and rationality in club football finances;
- to decrease pressure on salaries and transfer fees and limit inflationary effect;
- to encourage clubs to compete with(in) their revenues;
- to encourage long-term investments in the youth sector and infrastructure;
- to protect the long-term viability of European club football;
- to ensure clubs settle their liabilities on a timely basis.[65]

There are two main parts to FFP: (1) Clubs' transfer and employee payables must not be overdue (this has been monitored since the summer of 2013); and (2) clubs will be required to have their books break even starting in the financial years ending 2012 and 2013 (which will be accessed for the first

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59 *Id.* ¶ 77.

60 *Id.* ¶ 77–78.

61 *See generally* BENCHMARKING REPORT, *supra* note 17.

62 *Id.* Valencia CF was unable to pay its players for several months in the middle of the 2009/2010 season. *Valencia slip further away from salvation*, FIFA.COM (Mar. 8, 2009), http://www.fifa.com/world-match-centre/news/newsid/103/563/6/index.html.

63 BENCHMARKING REPORT, *supra* note 17, at 46, 48; *Green light for Financial Fair Play*, UNION OF EUR. FOOTBALL ASS'NS (Sept. 5, 2009), http://www.uefa.org/stakeholders/professionalfootballstrategycouncil/news/newsid=879610.html.

64 BENCHMARKING REPORT, *supra* note 17, at 46, 48.

65 *Financial Fair Play*, UNION OF EUR. FOOTBALL ASS'NS (June 11, 2014), http://www.uefa.org/protecting-the-game/club-licensing-and-financial-fair-play/index.html.

time before the 2013/2014 season).[66] Beginning with the 2013/2014 season, clubs are faced with sanctions from European football if they do not comply with FFP.[67] The sanctions UEFA can impose include withholding prize money, excluding the club from European competitions, a fine, or a reprimand.[68] For example, in 2014, UEFA found that Manchester City violated FFP and imposed the following punishments: a €60 million settlement to be paid to the European governing body over three years, a 21-player limit to the 2014/2015 season's Champions League squad, and a wage cap to the current level.[69] In 2014, UEFA found that the Serbian club Red Star Belgrade violated FFP and banned the club from the 2014/2015 season Champions League.[70] FFP will not be fully implemented before the 2017 financial year, as clubs will be allowed to have a limited loss each year.[71]

The UEFA Club Financial Control Body is in charge of carrying out FFP.[72] This body will be in charge of monitoring the clubs to make sure they comply with the break-even provision.[73] The clubs are permitted to lose €45 million between the 2011/2012 season and the 2013/2014 season. From the 2014/2015 to the 2017/2018 season, the overall permitted loss will be €30 million.[74] After that period, clubs are expected to break even, and owners are not permitted to bail the clubs out.[75] However, there is an acceptable €5 million deviation.[76] The relevant expenses considered in the break-even assessment includes the

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66 BENCHMARKING REPORT, *supra* note 17, at 49.

67 *Financial Fair Play Explained*, FINANCIAL FAIR PLAY, http://www.financialfairplay.co.uk/financial-fair-play-explained.php; Wayne Veysey, *What is Financial Fair Play and how will Uefa enforce it on the likes of Chelsea, Manchester City and Barcelona?*, GOAL (May 8, 2011), http://www.goal.com/en-gb/news/2866/analysis/2011/05/11/2479628/what-is-financial-fair-play-and-how-will-uefa-enforce-it-on.

68 Daniel Geey, *UEFA Sanctions Clubs for Debt and Financial Fair Play*, THE FINAL SCORE OF FOOTBALL LAW (Oct. 2, 2012), http://www.danielgeey.com/uefa-sanctions-clubs-for-debt-and-financial-fair-play-update/; *UEFA hands out first Financial fair play penalties*, BBC (Sept. 11, 2012), http://www.bbc.com/sport/0/football/19557934.

69 David Conn, *Manchester City take the lead to face down Uefa over break-even rules*, THE GUARDIAN (May 10, 2014), http://www.theguardian.com/football/david-conn-inside-sport-blog/2014/may/10/manchester-city-face-down-uefa-financial-fair-play.

70 *Red Star Belgrade excluded from Champions League after FFP breach*, THE GUARDIAN (June 6, 2014), http://www.theguardian.com/football/2014/jun/06/red-star-belgrade-excluded-champions-league-ffp-uefa.

71 FFP Regulations, *supra* note 46, art. 61.

72 *Id.* art. 1.

73 *Id.* art. 58.

74 *Id.* art. 61.

75 Wayne Veysey, *La Liga boys will continue to cherry-pick Premier League stars*, GOAL (Feb. 10, 2011), http://www.goal.com/en-gb/news/2896/premier-league/2011/02/10/2346282/financial-fair-play-could-hinder-english-clubs-but-wont-stop?ICID=AR_RA_4.

76 FFP Regulations, *supra* note 46, art. 61.

cost of sales, employee benefits expenses, and other operating expenses, plus either amortization or costs of acquiring player registrations, finance costs and dividends.[77] Costs that do not count toward the break-even assessment include youth development, stadium infrastructure, and community development.[78] Additionally, the clubs will not be allowed any overdue payables to other football clubs, or overdue payables towards employees, or social/tax authorities.[79] The clubs will have the responsibility to report any significant economic event that occurs during the license season to UEFA.[80]

If the clubs do not meet these requirements under the break-even provision, UEFA has the ability to consider a number of factors before imposing sanctions.[81] These factors include: an improving financial trend, the impact of exchange rates, budgeting accuracy, the debt situation, and force majeure (circumstances beyond the club's control).[82]

An important characteristic of FFP is that it only applies to competitions run by UEFA—the Champions and Europa Leagues.[83] FFP is only required by clubs seeking a UEFA license, which is required to compete in their competitions.[84] However, every club wants a UEFA license, due to the prestige and financial incentives in competing in the Champions and Europa Leagues.[85] It is therefore likely that FFP will effectively apply to every football club in Europe.

D. The Lawsuit

Daniel Striani, an agent for football players represented by lawyer Jean-Louis Dupont, lodged a complaint with the European Commission against UEFA's FFP regulations on May 6, 2013. The European Commission released a statement in May 2014 that it intends to dismiss the complaint and Striani had four weeks to submit observations before the Commission's decision

77 *Id.* art. 58.
78 *Id.*
79 *Id.* art. 66.
80 *Id.* art. 67.
81 *Id.* art. 68.
82 BENCHMARKING REPORT, *supra* note 17, Annex XI.
83 *Id.*
84 *Id.* art. 1.
85 *See supra* Part I.B.

becomes final.[86] A group of supporters from England, France, and Belgium have also filed a complaint with the European Commission, in July 2014.[87]

However, Striani also lodged a second legal challenge against UEFA in the Court of First Instance in Brussels.[88] In October 2013, Striani appeared for a hearing before the Court of First Instance to determine the schedule for hearing the complaint; the hearing will took in February 2015 and the judgment should be expected in March or April 2015.[89]

According to Dupont's editorial in the Wall Street Journal, he specifically alleges that the break-even rule is anti-competitive.[90] Dupont claims that FFP restricts competition in these ways:

- Restriction of investments
- Fossilization of the existing market structure
- Reduction of the number of transfers, of the transfer amounts and of the number of players under contracts per club
- Deflationary effect on the level of players' salaries.[91]

Dupont further believes that FFP constitutes collusion, and infringes on other EU freedoms such as freedom of movement and services.[92] This lawsuit is commonly known as the Striani challenge.

EU Commission has issued a joint statement with UEFA supporting the FFP regulations.[93] However, this statement is not binding. Additionally, the

[86] David Conn, *Uefa defeats legal challenge to financial fair play rules*, THE GUARDIAN (May 20, 2014), http://www.theguardian.com/football/2014/may/20/uefa-defeats-financial-fair-play-challenge; Javier Silles, Dupont: *El Fair Play Financiero crea una especie de NBA*, AS.COM (Aug. 20, 2014), http://futbol.as.com/futbol/2014/08/20/internacional/1408487874_102747.html.

[87] *Press Release: Football Fans Launch Legal Challenge to Financial Fair Play*, LAWINSPORT.COM (July 25, 2014), http://www.lawinsport.com/sports-law-news/item/press-release-football-fans-launch-legal-challenge-to-financial-fair-play.

[88] Ed Thompson, *Legal challenge to UEFA FFP rules by 'Bosman' Lawyer*, FIN. FAIR PLAY (May 9, 2013), http://www.financialfairplay.co.uk/latest-news/legal-challenge-to-uefa-ffp-rules-by-bosman-lawyer.

[89] *Moment of truth for UEFA: Financial Fair Play Ruling Due in 2015*, CNN (Jan. 10, 2014), http://edition.cnn.com/2014/01/10/sport/football/financial-fair-play-uefa-football/.

[90] Jean-Louis Dupont, *Football's Anticompetitive Streak*, WALL ST. J. (Mar. 25, 2013), http://online.wsj.com/article/SB10001424127887324077704578357992271428024.html. At this time, the court filings have not been published.

[91] Thompson, *supra* note 88.

[92] Dupont, *supra* note 90.

[93] Joint Statement by Vice-President Joaquin Almuni and President Michel Platini (Mar. 21, 2012), http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf; Letter from Michel Platini, President, UEFA to Joaquin Almunia,Vice-President of the Euopean Commission (Mar. 21, 2012), http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/75/1772175_DOWNLOAD.pdf.

statement primarily addresses how FFP furthers EU's policy in the field of state aid and does not address the competition law issues with FFP.[94]

II. EU COMPETITION LAW FRAMEWORK

There are two main parts to EU competition law: Article 101(1) of TFEU and Article 102 of TFEU, formerly known as Articles 81 and 82 of the EC Treaty.[95] Article 101(1) states the following:

> 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;
> > (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.[96]

This provision covers agreements between two or more independent market operators in which horizontal and vertical agreements that restrict competition of any kind are prohibited.[97] Article 101(1) is similar to Section 1 of the

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94 State aid is when undertakings gain government support, which gives the undertaking an advantage over a competitor. State aid is forbidden unless justified by general economic development. This is an issue in football, because when some clubs, like Valencia FC, began to fail financially, the government stepped in to support the club. This issue will be not addressed in this Comment. *State Aid Control Overview*, EUR. COMM'N (Aug. 8, 2013), http://ec.europa.eu/competition/state_aid/overview/index_en.html; *Varona: Valencia not for sale*, ESPN FC (Apr. 4, 2013), http://espnfc.com/news/story/_/id/1398925/varona-assures-fans:-valencia-not-for-sale?cc=5901.

95 *Antitrust Overview*, EUR. COMM'N (Aug. 16, 2012), http://ec.europa.eu/competition/antitrust/overview_en.html; *Application of Articles 101 and 102 TFEU (formerly Articles 81 and 82 of the EC Treaty)*, EUR. COMM'N (Mar. 3, 2011), http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm.

96 Treaty on the Functioning of the European Union art. 101, Mar. 25, 1957, 2008 O.J. (C 115) 88–89.

97 *Antitrust Overview*, *supra* note 95.

Sherman Antitrust Act.[98] The Striani challenge is challenging FFP under Article 101(1).[99]

Article 102 is similar to Section 2 of the Sherman Antitrust Act of U.S. antitrust law.[100] Article 102 states the following:

> 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."[101]

Article 102 basically prohibits an undertaking of a dominant position to abuse that position.[102]

In EU law, there is no special exception for sporting cases in EU competition law. In the *Meca-Medina and Macjen v Commission* opinion of 2006, the Court of Justice determined that if there is economic activity, then EU competition law applies.[103] Further, in *Walrave v Union Cycliste Internationale*, the Court of Justice held that a professional sport is an economic activity.[104] There is obvious economic activity at play here, as European football affords clubs the ability to make money in the range of €40

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98 *See* 15 U.S.C. § 1 (2004).

99 *See* Thompson, *supra* note 88.

100 *See* 15 U.S.C. § 2 (2004).

101 Treaty on the Functioning of the European Union art. 102, Mar. 25, 1957, 2008 O.J. (C 115) 89.

102 *Antitrust Overview*, *supra* note 95.

103 Case C-519/04 P, Meca-Medina and Macjen v. Comm'n, 2006 E.C.R. I-6991; Andrew Nixon, *Daniel Striani and Uefa's Financial Fair Play regulations: the new Bosman?*, SPORTING INTELLIGENCE (May 13, 2013), http://www.sportingintelligence.com/2013/05/13/daniel-striani-and-uefas-financial-fair-play-regulations-the-new-bosman-130501/.

104 Case 36/74, Walrave v. Union Cycliste Internationale, 1974 E.C.R. 1405.

million per year, from a combination of broadcasting revenue and prize money.[105]

This Comment will address each of these articles in turn, as it is undecided if the UEFA is considered an association of undertakings, or an undertaking itself. The status of the UEFA will determine under which of the articles FFP will fall under. Therefore, first, there must be a discussion on whether the UEFA would be considered an association of undertakings and/or an undertaking itself. An undertaking is an economic entity itself.[106] The European Commission takes the view that the UEFA is considered an association of undertakings, but is an undertaking itself as well.[107] This is based on the Court of Justice view that an undertaking includes "every entity engaged in an economic activity, regardless of the legal status of the entity."[108] With the UEFA, starting from the bottom of the pyramid structure, each club itself makes money through the sale of tickets, merchandise and so on, making each club an undertaking.[109] When the clubs combine to make the leagues, and consequently football associations, the leagues and football associations are associations of undertakings. However, the leagues and football associations also engage in economic activities themselves, such as through advertising, selling tickets and merchandise, and television broadcasting, which make the football associations undertakings as well.[110] The football associations then comprise to form the UEFA, an association of undertakings.[111] Further, like the leagues and football associations, the UEFA engages directly in economic activity, making it an undertaking as well.[112] The UEFA, as the only organization organizing establishing European-wide football competitions, holds a dominate position in the European football market. That is why there is potential for FFP to be challenged under either Article 101(1) or Article 102.

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105 *See supra* Part I.B.

106 Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751.

107 Commission Decision 2003/778, 2003 O.J. (L 291) 25, 42 [hereinafter Commission Decision].

108 Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751.

109 Dirk Kaufmann, *UEFA has commercialized football*, DW (Sept. 17, 2013), http://www.dw.de/uefa-has-commercialized-football/a-17095173.

110 For example, the English Football Association (FA), owns the rights to the English internationals, and the FA cup. FA receives TV money from English international games and FA cup games. FOOTBALL ASS'N LTD., 2012 REPORT AND FINANCIAL STATEMENTS 17 (2013).

111 *See supra* Part I.A.i.

112 The UEFA receives money from the media rights and commercial contracts from the Champions League. The UEFA's gross revenue is just under 1.5 billion euros just from each Champions League season, and the UEFA keeps twenty percent of that amount. This amount does not include any money UEFA makes from the Europa League. Kaufmann, *supra* note 109.

If the UEFA is found to be a single undertaking, then FFP would be considered an Article 102 violation. However, if the UEFA is found to be an association of undertakings, then FFP would be considered an Article 101(1) violation due to the various independent undertakings colluding in an anti-competitive agreement that is illegal under Article 101(1).

The Striani challenge claims FFP falls under Article 101, asserting that the UEFA is essentially a trade association for legal purposes.[113] The Striani challenge argues that FFP is a joint agreement limiting clubs ability to spend money on players' wages and transfers.[114] Ultimately, however, it does not matter under which of these articles the UEFA will fall, as FFP would be illegal under either article. If the Striani challenge fails under Article 101(1), another challenge can be posed under Article 102. However, the Article 101(1) argument is much stronger than an argument under Article 102, so it would be easier for the Striani challenge to succeed under Article 101(1).

Next, before evaluating FFP under EU competition law, the market must be defined first, as in any competition law case.[115] EU competition law requires that the market be defined first in terms of geography and then in terms of product.[116] The geographical market is comprised of all the areas in which the undertakings are involved in the supply and demand of the products and where the conditions of competition are sufficiently homogeneous.[117] Here, the geographic market is comprised of all fifty-four nations that compete in the UEFA.[118] This is basically all of Europe, including countries that do not belong to the EU.[119]

Next, the product market must be determined. The product market is comprised of "all [the] products and/or services that are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[120] The main characteristic

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113 *See* Dupont, *supra* note 90.

114 *Id.*

115 ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES 29 (3d ed. 2012).

116 *Id.*; *see* Commission Notice 97/C372/03, 1997 O.J. (C 372) 5, 6.

117 EZRACHI, *supra* note 115.

118 UEFA rankings: Country coefficients 2014/15, UNION OF EUR. FOOTBALL ASS'NS (Nov. 7, 2014), http://www.uefa.com/memberassociations/uefarankings/country/index.html.

119 *See* Commission Notice 97/C372/03, 1997 O.J. (C 372) 5, 6; *see also supra* text accompanying note 30.

120 Commission Notice 97/C372/03, 1997 O.J. (C 372) 5, 6.

to determine a product market is to determine if there is any substitute for that product.[121]

The UEFA is organized as an association of football associations that overlooks football competitions and clubs, specifically European-wide competitions. The product market is therefore professional club European football competitions.[122] There are no substitutes for this. While people can watch other professional sports, it is a different type of entertainment than football, as people only prefer to watch certain sports. The national team competitions have a different market and, therefore, are considered a different product.[123] No other European-wide club competitions exist. Therefore, no other product, including national team competitions, can compare to watching the club competitions.[124]

III. ARTICLE 101(1)

Article 101(1) violations are comprised of three elements.[125] First, there must be proof that there is some form of collusion between undertakings.[126] Second, the collusion must affect trade between member states.[127] Third, the agreement must have the "object or effect of restricting competition within the common market."[128] Each of these elements will be taken in turn to show that FFP violates Article 101(1) and, therefore, considered illegal by violating EU

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121 EZRACHI, *supra* note 115, at 32 (citing Case 27/76, United Brands v. Comm'n, 1978 E.C.R., 207).

122 In U.S. antitrust law, it has been held that the market of sports teams is that specific sport. *See* Flood v. Kuhn, 407 U.S. 258, 282–83 (1972) (discussing baseball antitrust exceptions). For example, when analyzing baseball antitrust cases, the market was held to be professional baseball. *See id.*

123 Club competitions have a different market from national competitions, because club teams have globalized and their audience and supporters are all over the world. While, national competitions have the audience of their country and traditionally their supporters are composed of their citizens.

124 Even if there is limited substitutability, products can be held to be different markets. If products are used for different purposes, the products belong to separate markets. For example, in Hoffmann-La Roche v Commission, the Court of Justice held that limited substitution seemed insufficient to establish interchangeability. Case 85/76, Hoffman-La Roche v. Comm'n, 1979 E.C.R. 461. Club and national competitions have limited substitution, as people tend to support their country in the national competition, and have a club team they cheer for as well, it may be the same sport, but club and national team competitions have different audiences. *See* EZRACHI, *supra* note 115, at 3.

125 *See* VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 40 (9th ed. 2007).

126 *Id.*

127 *Id.*

128 *Id.*

competition law. Article 101(1) does not distinguish between horizontal and vertical agreements.[129]

A. Collusion between Undertakings

Article 101(1) requires that there be an agreement between undertakings or a decision by an association of undertakings.[130] If the view is taken that the UEFA is an association of undertakings, or an association of associations of undertakings, then Article 101(1) is violated.[131] The articles of an association, such as the UEFA, rarely amount to anticompetitive activity that offends Article 101(1).[132] It is more frequent that agreements among the members in an association violates Article 101(1).[133] Often, the attempt to impose discipline or order into the market violates Article 101(1).[134]

FFP is an explicit agreement[135] between undertakings attempting to impose discipline into the football market violating Article 101(1). While the UEFA is considered an undertaking itself, it is also made up of other undertakings (the football associations) that approve FFP.[136] Additionally, FFP is approved by the UEFA Club Competitions Committee, the European Club Association Board, and the Professional Football Strategy Council, which is comprised of representatives from the European Professional Football Leagues, the players (FIFPro Europe), the clubs (European Club Association), and the UEFA vice-presidents.[137] Also, as discussed above, clubs themselves are becoming more and more involved in the UEFA and take part in discussions and agreements on initiatives including FFP.[138]

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[129] ROBERT LANE, EC COMPETITION LAW 81 (2000). Vertical agreements are agreements between different levels of the production chain. *Id*. at 92. Horizontal agreements are agreements between different entities at the same level of the production chain. *Id*. at 82.

[130] Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47, 88.

[131] *See supra* Part II.

[132] *See* LANE, *supra* note 129, at 67 n.85, 68 n.93.

[133] *See id*.

[134] *Id.* at 67.

[135] *See* KORAH, *supra* note 125, at 49, 51; *supra* Part I.C. FFP is an express written agreement approved on by many of the necessary organizations, with a sanction-loss of a license if not complied with. *Financial fair play: all you need to know*, UNION OF EUR. FOOTBALL ASS'NS (Feb. 28, 2014), http://www.uefa.org/community/news/newsid=2064391.html.

[136] *See supra* Part I.A.i.

[137] *Green light for Financial Fair Play*, UNION OF EUR. FOOTBALL ASS'NS (Sept. 5, 2009), http://www.uefa.org/stakeholders/professionalfootballstrategycouncil/news/newsid=879610.html.

[138] *See supra* Part I.A.i.

Therefore, FFP is easily considered collusion between undertakings, as the different football associations and clubs approve of the agreement, the FFP regulations.

B. The Agreement Affects Trade among Member States

For FFP to violate Article 101(1), this agreement must affect the freedom of trade among member states.[139] First, to prove that FFP is affecting trade, the markets must be examined to see how the agreement affected the markets.[140] The European Court of Justice set the standard for the existence of such agreements in *Société Technique Minière*.[141] The analysis has two factors. First, the agreement must be examined to see if it is "capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States."[142] Second, the agreement must be analyzed to see if it "may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States."[143] An agreement need not currently affect the pattern of trade, but merely have the potential to do so.

This is not a difficult requirement. If the parties—the many national football associations and clubs—to the agreement are in more than one member state there is little chance that the agreement does not affect trade among the member states of the European Union.[144] 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. Due to the amount of economic activity among the clubs scattered throughout Europe, there is little to no chance that FFP would not meet this requirement.[145]

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[139] Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47, 88.

[140] *See* LUIS O. BLANCO, MARKET POWER IN EU ANTITRUST LAW 28 n.45 (Andrew Read trans., 2012).

[141] LANE, *supra* note 129, at 68–69.

[142] Case 22/78, Hugin v. Comm'n, 1979 E.C.R. 1870; *see* LANE, *supra* note 129, at 68.

[143] Case 56/65, Société Technique Minière v. Maschinenbau Ulm, 1966 E.C.R. 236.

[144] *See* LANE, *supra* note 129, at 70.

[145] *See supra* Part I.B.

C. The Agreement Has the Object or Effect of the Prevention, Restriction or Distortion of Competition

Article 101(1) states that an agreement is illegal if it has the "object or effect the prevention, restriction or distortion of competition within the internal market."[146] Thus, even if an agreement does not manage to affect competition, but the object of the agreement was to do so, then Article 101(1) declares the agreement illegal. Similarly, an agreement that is completely innocent when made, but has the effect of restricting competition, is illegal. This is the essential core of Article 101(1).[147]

Article 101(1) holds illegal any agreement that prevents, restricts or distorts competition within the EU through object or effect and, therefore, FFP will be analyzed first to see if it distorts competition by the object. If FFP is found not to hurt competition by object, FFP must be analyzed to see if it affects competition by effect.

1. Affecting Competition by Object

When determining whether an agreement prevents, restricts, or distorts competition by object, there is no requirement to look at the concrete effects of the agreement.[148] According to the Court of Justice in *Consten and Grundig v Commission*, if the agreement has the potential to restrict competition, then that is sufficient.[149] Agreements that affect competition by object are agreements that, by their very nature, have the potential to restrict competition.[150] If, by merely looking at the agreement, an anticompetitive objective is shown, that agreement affects competition by object. This could be seen as very similar to a quick look approach in American antitrust law. There are several types of agreements that the Court of Justice has held to be restricting competition by object, including certain agreements that have hard core effects, such as price-fixing, export bans, and absolute territorial protection.[151]

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146 Commission Notice 2014/C291/08, 2014 O.J. (C 291) 1.

147 KORAH, *supra* note 125, at 66–67; LANE, *supra* note 129, at 79.

148 Joined Cases 56 & 58/64, Établissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299.

149 *Id.*

150 Commission Notice 2004/C101/08, 2004 O.J. (C 101) 97, 100.

151 *EU reforms for distribution agreements—what do they mean for business?*, NORTON ROSE FULBRIGHT (Oct. 2009), http://www.nortonrosefulbright.com/knowledge/publications/30076/eu-reforms-for-distribution-agreements-what-do-they-mean-for-business.

There are a number of factors that the Commission suggests to analyze if an agreement affects competition by object.[152] These factors consist of: (1) the content of the agreement and the objective aims pursued by it; (2) the context in which it is to be applied and the actual conduct and behavior of the parties on the market; and (3) an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required.[153]

a. Content and Intent of Agreement

When just looking at the content of FFP and the objectives UEFA outlined, it is clear that FFP could be violating Article 101(1). UEFA outright admits that it has an anti-competitive intent in part with establishing FFP regulations.[154] The second principal objective states that UEFA intends "to decrease pressure on salaries and transfer fees and limit inflationary effect."[155] It seems clear that UEFA has a blatant anti-competitive objective in attempting to affect the salary, and transfer fee market.

b. Restoring National Divisions

Another argument of how FFP violates Article 101(1) by object is that FFP creates absolute territorial protection by the way FFP regulates the conduct and behavior on the market, which is violating Article 101(1) by object. The Court of Justice in *FA Premier League v QC Leisure* held that an agreement that might restore the divisions between national markets must be regarded as an agreement whose objective is to restrict competition, within the meaning of Article 101(1) TFEU."[156] FFP is creating absolute territorial protection, because the regulations are creating an entrenching of the market, which would restore the divisions of the national markets.

Entrenching the markets was not UEFA's objective with FFP, but although intention may be taken into consideration, intention is not required when determining if an agreement restricts competition by object.[157] Even with

152 *See generally Guidelines on the application of Article 101(3) TFEU (formerly Article 81(3) TEC)*, EUR-LEX (Feb. 21, 2011), http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1415491584638&uri=URISERV:l26114.

153 *Id.* ¶ 22.

154 Stephen Weatherill, *Financial Fair Play and the law Part III: Guest post by Professor Stephen Weatherill*, SOCCERNOMICS (May 14, 2013), http://www.soccernomics-agency.com/?p=469.

155 *Financial Fair Play*, *supra* note 18.

156 Case C-403/08, Football Ass'n Premier League v. QC Leisure, 2011 E.C.R. 0000 para. 247.

157 EZRACHI, *supra* note 115, at 81 (citing Case C-551/03P, Gen. Motors v. Comm'n, 2006 E.C.R. I-3173 paras. 77–78).

legitimate objections, an agreement may be viewed as having a restrictive objective if that objective restricts the competitiveness of the market.[158] To determine if FFP will restore the divisions of the national markets, there must be an analysis of how the market would have been with no agreement, and how the market looks after the agreement.[159]

To perform this analysis, one must first define the market. As stated above, the market here should be defined as European football club competitions.[160] To analyze if the agreement restricts competition by object, the market will be looked at first without an agreement, which is essentially looking at the market with no FFP regulations in effect. Then the market will be looked at with FFP regulations in effect.

Before FFP, clubs were allowed to transfer players with no price restrictions.[161] This allowed owners of clubs to put as much of their personal money as they pleased into the club. For example, Manchester City, owned by Abu Dhabi United Group, invested their personal money into the club, specifically the players.[162] Their personal investment was over €235 million.[163] This investment allowed Manchester City to climb from 19th place in revenues of football clubs worldwide in the 2008/2009 season to 7th place in revenues in the 2011/2012 season and to sixth place in the 2012/2013 season.[164] The investment the owners made in the playing squad allowed the club to win the Premier League and reach the UEFA Champions League, which has allowed Manchester City to increase revenue from those events without relying on the owners' personal money.[165]

Looking at the market after FFP regulations are placed into effect, owners will no longer be able to use their personal money to invest in a better playing

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158 *See* Case C-551/03P, Gen. Motors v. Comm'n, 2006 E.C.R. I-3173 para. 64.

159 EZRACHI, *supra* note 115 at 81 (citing opinion of Advocate General Roemer (Mar. 23, 1966)).

160 *See supra* text accompanying note 115.

161 *See* Dupont, *supra* note 90.

162 DELOITTE SPORTS BUS. GROUP, SPANISH MASTERS: FOOTBALL MONEY LEAGUE 25 (Mar. 2010), http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/6a5fb29b3f907210VgnVCM100000ba42f00aRCRD.htm [hereinafter SPANISH MASTERS].

163 *Id.*

164 *Id.* at 6; DELOITTE SPORTS BUS. GROUP, CAPTAINS OF INDUSTRY: FOOTBALL MONEY LEAGUE 8 (Jan. 2013), http://www.deloitte.com/view/en_GB/uk/industries/sportsbusinessgroup/sports/football/deloitte-football-money-league/c0d0cc64dac5c310VgnVCM3000003456f70aRCRD.htm; DELOITTE SPORTS BUS. GROUP, ALL TO PLAY FOR: FOOTBALL MONEY LEAGUE 8 (Jan. 2014), http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/Sports%20Business%20Group/uk-deloitte-sbg-dfml-2014.pdf [hereinafter ALL TO PLAY FOR].

165 *See* SPANISH MASTERS, *supra* note 162, at 25.

squad to reach the better leagues and increase the club's revenue, due to the "break-even" principal.[166] Since owners can no longer financially help the clubs, clubs will have a much more difficult time in reaching the league position that allows a club to participate in the Europa or Champions League.[167] Those leagues have financial benefits, including millions of euros worth of broadcasting revenue and prize money.[168] Instead the clubs are entrenched into the position they were at when FFP went into effect; Champions league clubs will have resources that other clubs cannot match.[169] The path Manchester City took to success cannot be repeated.

The next question is whether this entrenchment at the national level translates into entrenching the market throughout Europe by restoring the national divisions. When considering owners are no longer allowed to invest their own money into the club or playing squad, along with the fact that UEFA distributes part of the broadcasting money by the population size of the country the club is from, FFP arguably restores national divisions.[170] Distributing broadcasting money by country population gives certain leagues a huge advantage. For example, FC Porto in Portugal received €3,163,000 in broadcasting money, while FC Schalke 04 in Germany received €11,380,000, despite playing the same number of games.[171] Leagues in places with large populations, like Germany or England, will always have an advantage over leagues in more sparsely populated states, like Ukraine or Scotland. Under FFP, the leagues with smaller populations will always have a disadvantage of lower broadcasting revenue, despite similar numbers of games played. In part, the main disadvantage will be that the clubs in the more sparsely populated

166 FFP Regulations, *supra* note 46, at 35–36.

167 The external investment Manchester City had access to, the owner's personal money, is not allowed to be used to improve a club or the club's standing. Manchester City's path to success will not be repeated. Without external investment, it will be much harder for clubs to climb to the top of the domestic league and qualify for European football. Andrew Critchlow, *Manchester City FC Have Plans for Global Brand Domination*, TELEGRAPH (Aug. 30, 2014), http://www.telegraph.co.uk/finance/newsbysector/industry/11065644/Manchester-City-FC-have-plans-for-global-brand-domination.html (describing Manchester City's efforts to build an international network of teams in order to avoid FFP sanctions and remain sustainable).

168 *See supra* text accompanying notes 44–60. The prize money for the Champions League will be increased through 2018, due to the need of more football-related revenue. *UEFA To Up Champions League Prize Money As Need For Income Increases In FFP Era*, SPORTSBUSINESS GLOBAL (Oct. 31, 2013), http://www.sportsbusinessdaily.com/Global/Issues/2013/10/31/International-Football/Champions-League-money.aspx?hl=financial%20fair%20play&sc=0.

169 Wayne Veysey, *La Liga big boys will continue to cherry-pick Premier League stars*, GOAL (Feb. 10, 2011), http://www.goal.com/en-gb/news/2896/premier-league/2011/02/10/2346282/financial-fair-play-could-hinder-english-clubs-but-wont-stop?ICID=AR_RA_4.

170 *See supra* text accompanying notes 53–56.

171 *Id.*

states will not be able to afford the better players, due to the lesser amount of broadcasting money, thus earning less football-related revenue, which will make the club less competitive. With the inability of independent owners to invest personally into the squad, resulting in an improvement in their club which helps the league as a whole become stronger, this will become a permanent disadvantage.

This new plan will give the stronger leagues an advantage, because the clubs in those leagues will have more money to invest into the players, and the league itself will be more attractive to players because the result of better players is a more competitive league. A more competitive league will attract more markets to sell more merchandise to, better sponsorship deals, and better broadcasting deals. Those leagues attracting higher revenue will have the advantage of always being stronger than other leagues, and it will be very difficult to break that deadlock.[172] The combination of the break-even principal and broadcasting money by the population size of the country makes the "interpenetration of national markets more difficult," which has been found illegal in *FA Premier League v QC Leisure*.[173]

Some markets, divided by country, will always be stronger than others, causing those markets to be more attractive to the consumers.[174] The weaker leagues will no longer have the ability to slowly change into a stronger league.[175] Since the leagues are divided by country, certain nations' leagues

[172] Malaga's new owners have plenty of money to invest into their squad, but due to the break-even principal they are not permitted to. If owners were allowed to invest their money, Malaga could have a stronger squad and this would help make La Liga a more competitive and stronger league. *See infra* text accompanying notes 194–200.

[173] Case C-403/08, Football Ass'n Premier League v. QC Leisure, 2011 E.C.R. 0000 para. 247.

[174] The more attractive leagues, such as the Premier League or La Liga, have more people buying tickets and merchandise, which feeds even more money into those markets. Also, since more people are watching those leagues, sponsorships and broadcasting deals are worth more and bring more money into those markets that can be spent on high-value players, which make those leagues even more attractive to consumers. It is a re-enforcing cycle. *See Generally Spanish Masters, supra* note 162; *All to Play For, supra* note 164; *supra* text accompanying notes 174–175.

[175] As seen in the past few years, Ligue 1, the top French league, has become stronger, in part because of the investment in Paris Saint-Germain FC. As that club became stronger there has been increased interest in Ligue 1, which brings more merchandise sales, and higher broadcasting deals. However, Ligue 1 is stopped from becoming any stronger due to FFP. Monaco FC was recently bought by billionaire Dmitry Rybolovlev who has invested heavily into the clubs. This past season, 2013/2014, Monaco FC returned to the top tier, Ligue 1. The amount Dmitry Rybolovlev invested into the club by buying a better squad will not meet the FFP requirements. Monaco FC will not play European football this season, however, the club it is likely to qualify for European football sooner than later, as Monaco FC is currently second in the league. Under FFP, Monaco FC will be denied a UEFA license to play in the Champions League. Because of FFP, Ligue 1 cannot transition into a stronger league. Under FFP, clubs in Ligue 1 are forbidden from external investment. Without

will continue to be the big, most competitive leagues, while other nations' leagues will stay small, and less competitive.[176]

In a sense, the separation of the big leagues from the smaller leagues will restore the divisions of the national markets over the EU common market since a dynamic of small markets versus bigger markets will be created, or minimally it will create some sort of barrier between markets. The barrier created between markets will be based on which markets (leagues) can afford what type of players and which markets clearly cannot afford certain players; this is not a common market.

Separating different national markets is frustrating the objective of the Treaty to integrate into a single economic market. By creating barriers between markets, FFP is restricting the market by object, which is violating Article 101(1). This is a potential argument that could be used to prove that FFP is violating Article 101(1), however, it is clear that FFP affects competition by effect under Article 101(1) by actual tangible effects on the market.

2. *Affecting Competition by Effect*

If the argument that FFP is affecting competition by object is not convincing to the court, then the FFP agreement must be analyzed to determine if and how it is affecting competition by effect.[177] When analyzing an agreement to determine if the agreement is "preventing, restricting or distorting

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external investment, clubs cannot strengthen, which has the effect of not allowing the league as a whole to grow into a more competitive league. Because of the effects of FFP, Ligue 1 always will be considered a weaker league then La Liga or the English Premier League. Jonathan Johnson, *Why French Ligue 1 Deserves More of Our Attention*, BLEACHER REP. (Jan. 18, 2013), http://bleacherreport.com/articles/1490231-why-french-ligue-1-deserves-more-of-our-attention/; Christopher Almeras, *Could Ligue 1's Growing South American Influence Change the French Game?*, BLEACHER REP. (Sept. 12, 2012), http://bleacherreport.com/articles/1331836-could-ligue-1s-growing-south-american-influence-change-the-french-game; Owen Gibson, *Jury remains out on Michel Platini's financial fair play project*, THE GUARDIAN (Aug. 5, 2013), http://www.theguardian.com/football/blog/2013/aug/05/michel-platini-financial-fair-play.

[176] The English Premier League is considered the strongest and most competitive league in Europe. The top Spanish league, La Liga, is also considered one of the strongest leagues, due to its consistent strong showing in European competitions. Some of the weaker leagues include the Scottish top league, because traditionally there were only two clubs who would win the league, Celtic, or Rangers FC. The top French league, Ligue 1, is considered a weaker league, as few of the clubs have consistent strong results in European football. However, Ligue 1 is considered stronger than leagues like the Scottish League, as the domestic clubs' competition is much more difficult. Andrew McNair, *Top Ten European Leagues: And No.1 is Not The English Premier League*, BLEACHER REP. (Jan. 15, 2001), http://bleacherreport.com/articles/326726-top-ten-European-leagues-and-no1-is-not-the-english-premier-league/.

[177] *See supra* text accompanying note 147.

competition by effect," potential and actual effects must be analyzed.[178] The Commission has recommended that when analyzing this, it is helpful to look at the "negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability."[179]

The Court of Justice has held that there are two steps to be followed to analyze if there is an effect on competition.[180] First, the market must be defined.[181] As mentioned above, the market here is Europe-wide club football competition.[182] This step therefore will not be discussed further here. Second, it is necessary to analyze if the agreement impedes access to the market.[183] To determine if the agreement impedes access to the market, the legal and economic effect of the agreement must be analyzed.[184]

There are a number of factors that the Court of Justice has recommended to look at to analyze if the agreement impedes access to the market.[185] Some of these factors are: (1) the opportunity to access the market; (2) the conditions under which competitive forces operate on the relevant market; and (3) if it is difficult to access market, whether the agreement contributes to the cumulative effect produced by the totality of the similar contracts in that market.[186] Again, to conduct this analysis the market must be analyzed with FFP, as opposed to how the market would be operating without FFP; the factors mentioned above will be used in this analysis.[187] The agreement must be looked at in an economic context.[188]

This analysis will be accomplished by looking at different aspects of the business of football and how FFP will affect each aspect. First, this Part will analyze how investments can be made by owners in their club. The second aspect of football business that will be analyzed is the transfer market. The third aspect is how FFP will affect the players' wages and clubs' status.

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178 EZRACHI, *supra* note 115, at 83 (citing Communication from the Commission, 2004 O.J. (C 101/08)).
179 *Id.*
180 *Id.* at 85 (citing Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. I-935).
181 *Id.* (citing Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. I-935 paras. 16–18).
182 *See supra* text accompanying notes 115–18.
183 EZRACHI, *supra* note 115, at 85 (citing Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. I-935 para. 19).
184 KORAH, *supra* note 125, at 61.
185 Case C-234/89, Stergios Delimitis v. Henninger Bräu AG, 1991 E.C.R. I-935 paras. 20, 22, 24.
186 *Id.*
187 KORAH, *supra* note 125, at 62.
188 *Id.*

a. Investments Made by Owners

FFP will force clubs to break even on their balance sheets, and this will have a major effect on the market as owners can no longer invest their own money into clubs, as discussed above.[189] FFP has an effect on how much money clubs can spend on players, and if clubs do not reach Champions League level, this could potentially force teams to sell players to have the money for the transfer funds for newer players, or to just break even.[190] Before, teams did not have to think about those restrictions. If a team failed to reach Champions League, but the owner had the money to invest in the player squad, it was a viable and smart option for the team to improve through the owner's investment of his personal money.[191] Restricting investments will cause small clubs to stay small, and big clubs to stay big eliminating competition between the different types of clubs.

Under FFP, an owner personally investing his or her own money is no longer an option.[192] With this lack of ability to invest, small clubs will stay small and no longer be able to jump from being a mid-table team to a team that can compete consistently in UEFA's European championships.[193] Before FFP took effect, Manchester City's owners personally invested over $1 billion into the squad turning the club who finished in tenth place in 2008/2009 season to a team who won the Premier League and have been in the top three for the last four seasons.[194] However, the Manchester City's club accounts showed that the club lost $255 million between 2011 and 2013.[195]

This will not happen again. Just look at Malaga CF, owned by billionaire Sheikh Abdullah bin Nasser Al-Thani, who has invested over €190 million in the club between 2010 and 2012.[196] In December 2013, UEFA banned Malaga

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189 *See supra* text accompanying notes 90–91; FFP Regulations, *supra* note 46, at 36.

190 *See Failure to Qualify for the Champions League Would Force Club to Sell Players to Generate Transfer Funds for Targets Following Implementation of New UEFA Spending Rules*, GOAL (Apr. 25, 2011) http://www.goal.com/en-gb/news/2896/premier-league/2011/04/25/2457202/manchester-city-set-to-curb-spending-this-summer-to-comply?ICID=AR_RA_1.

191 *See* SPANISH MASTERS, *supra* note 162, at 25.

192 *See* FFP Regulations, *supra* note 46, at 36.

193 *See* Dupont, *supra* note 90.

194 Ishaan Tharoor, *Four Ways English Champions Manchester City Reflect the New World Order*, WASH. POST (May 12, 2014), http://www.washingtonpost.com/blogs/worldviews/wp/2014/05/12/4-ways-english-champions-manchester-city-reflect-the-new-world-order/.

195 *Id.*

196 Dermint Corrigan, *Malaga expect UEFA ban to be overturned*, ESPN FC (Jan. 2, 2013), http://espnfc.com/news/story?id=1285415&cc=5901.

from all European competitions and fined the club €300,000 because the club was overdue on repaying debt to Spanish tax authorities and other clubs.[197] By the time the ruling was made, Malaga was back on sound financial grounds.[198] Instead, the over-payables principal, Articles 65 and 66, were violated.[199] Now instead of Malaga being a more competitive team and making La Liga more competitive, the club was banned from participating in the UEFA league this season, and forced to sell one of its breakout young players, Isco.[200] If FFP was not in effect, Malaga's owner could have retained one of the club's star players, bought more star players, and increased the club's standing in La Liga and potentially placed better than the quarterfinals Champions League finish from last season.[201] But due to FFP, this is not an option to Malaga CF, unlike when Manchester City had the option less than a decade earlier.

This example of Manchester City before FFP, and Malaga CF after FFP shows clear anticompetitive effects of the FFP regulations. The regulations restrict investments. By restricting investments, smaller clubs can no longer invest in long-term success.[202] The result of the restricting small clubs' ability to invest in long-term success adversely affects the competition balance, because under FFP, the club's success is determined through initial success, and the market size of the club.[203] To offset those factors to compete with those clubs that already have a high market share and success in European football, a club needs external investment.[204] Under FFP rules, there is no external investment allowed.[205]

If a club does not have the reputation of clubs like Liverpool, Barcelona, Manchester United or AC Milan to receive profit from merchandise or tickets

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[197] Jonathan Howard, *Malaga's Appeal Loss is a UEFA Financial Fair Play Win*, BUS. OF SOCCER, (June 13, 2013), http://www.businessofsoccer.com/2013/06/13/malagas-appeal-loss-is-uefa-financial-fair-play-win/; Jonathan Howard, *Malaga: Scapegoat Or First FFP Trophy*, BUS. OF SOCCER (May 24, 2013), http://www.businessofsoccer.com/2013/05/24/malaga-scapegoat-or-first-ffp-trophy/.

[198] Corrigan, *supra* note 196.

[199] *See* FFP Regulations, *supra* note 46, at 39–41.

[200] Jerrad Peters, *How the likes of Chelsea, City, PSG and Monaco Can Escape FFP Sanction*, BLEACHER REP. (June 13, 2013), https://bleacherreport.com/articles/1672084-how-the-likes-of-chelsea-city-psg-and-monaco-can-escape-ffp-sanction.

[201] *Id.*

[202] HENNING VOPEL, IS FINANCIAL FAIR PLAY REALLY JUSTIFIED? AN ECONOMIC AND LEGAL ASSESSMENT OF UEFA'S FINANCIAL FAIR PLAY RULES 11 (2013).

[203] *Id.* The initial success leads to more broadcasting and prize money, while market size leads to more merchandise sales, and the ability to increase prices. *Id.*

[204] *Id.*

[205] FFP Regulations, *supra* note 46, art. 61.

on its name alone,[206] it must depend solely on its success in competitions to gain financial awards.[207] The club must gain a reputation and a larger market share through being successful in competitions like Manchester City. Manchester City used to be a local team with limited international appeal.[208] Once it began to succeed due to the owner's investments, it slowly grew to have international appeal and developed a fan base. Manchester City now receives large amounts of football-revenue due to its current reputation, one that could not have been achieved without external investment.[209]

A club will not be able to achieve the type of success it needs to reach a higher level, because without the financial awards from being successful in competitions or from its reputation, a club will not have enough football related revenue to be able to afford good players. Clubs will be fixed in what kinds of leagues and markets, they can compete in; this adversely affects competition.

Additionally, restricting investments will also entrench which leagues are big, and which leagues are small because the market size of different leagues will be fixed.[210] Customers will naturally watch the bigger leagues, and the market size will be fixed in time. Without a larger market size and the benefits of a larger market, as well as increased broadcasting revenue and larger sponsorships, clubs in smaller leagues will not be able to improve and achieve a higher UEFA coefficient.[211] The result of a higher UEFA coefficient is more

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[206] Another example is how Manchester United failed to qualify for the Champions League for the 2014/2015 season and lost that income. However, in July 2014, Manchester United signed a world-record £47 million-per-year shirt sponsorship deal with Chevrolet. Manchester United was able to sign a high value deal due to its globally-known reputation, despite having its worst season in decades. Due to the deal, Manchester United will only have a net loss of $35 million instead of $55 million. *See* Mike Ozanian, *The World's Most Valuable Soccer Teams*, FORBES.COM (May 7, 2014), http://www.forbes.com/sites/mikeozanian/2014/05/07/the-worlds-most-valuable-soccer-teams-3/; Alex Miller and Nick Harris, *Man Utd's Chevrolet deal pushes Premier League shirt values to £191m*, SPORTINGINTELLIGENCE.COM (July 28, 2014), http://www.sportingintelligence.com/2014/07/28/man-utds-chevrolet-deal-pushes-premier-league-shirt-values-to-191m-280701/.

[207] For example, in Turkey, Galatasaray achieved its second-consecutive domestic title in the 2012/2013 season and made it to the quarter-finals of the Champions League and used this success to sign new sponsorships with Opel, W Collection and HCL Infosystems. *See* Ozanian, *supra* note 206.

[208] *See* Tharoor, *supra* note 194.

[209] *Id.*

[210] *See supra* Part.III.A.ii.a.

[211] UEFA coefficient is based on how well each league club places in European football the year before. Clubs within leagues with more broadcasting revenue and larger sponsorships and thus higher football revenue will have more resources to invest in a better playing squad and place higher in the competitions, which will give those leagues a higher coefficient and more European football spots the next year. *See generally UEFA*

club places in European football, which results in the financial awards that come with those competitions. These received financial awards allow clubs to sustain their success by strengthening their leagues.

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.

b. Transfer Market

i. Restricting Transfer Prices Artificially

FFP will negatively affect the conditions in which competitive forces are allowed to operate on the relevant market. The conditions in which forces are allowed to operate are one of the factors the Court of Justice takes into account when determining the effect of an agreement on the market.[212] FFP will not only entrench the market, but its break-even principle will affect the supply and demand of the transfer market. The break-even principle establishes a capped number of how much each team can spend,[213] which is essentially an artificial ceiling on the demand allowed in the market. The artificial ceiling does not reflect the amount club owners are willing to put into the market.[214] Paris Saint-Germain (PSG) admitted that its interest in signing Angel Di Maria ended during the 2014 summer transfer window because the transfer price would be too expensive under Financial Fair Play restrictions, not because the club lacked the money to spend.[215] Therefore, Manchester United signed Di Maria without any real competition that would have increased his transfer fee.[216] This restricted Di Maria's transfer fee artificially.

Rankings, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.com/memberassociations/uefarankings/country/index.html (last visited Oct. 22, 2014).

[212] *See supra* Part II.

[213] FFP Regulations, *supra* note 46, art. 61.

[214] *See Mourinho: FFP Prevented Striker Moves*, ESPNFC.COM (Feb. 11, 2014), http://espnfc.com/news/story/_/id/1711663/chelsea-boss-jose-mourinho-ffp-prevented-edinson-cavani-radamel-falcao-moves?cc=5901.

[215] *See* Tom Conn, *PSG Deem Angel Di Maria as "Too Expensive,"* INSIDESPANISHFOOTBALL.COM (Aug. 7, 2014), http://www.insidespanishfootball.com/119482/psg-deem-angel-di-maria-as-too-expensive/.

[216] *See* Amlan Majumdar, *Manchester United Move Ahead Of PSG In The Race To Sign Di Maria*, HARDTACKEL.COM (Aug. 22, 2014), http://www.thehardtackle.com/2014/manchester-united-move-ahead-of-psg-in-the-race-to-sign-di-maria/.

Additionally, in the summer 2014 transfer window, Manchester City's inability to sign Radamel Falcao came down to the FFP regulations, specifically the need to balance the books. The decision was not based on whether the club wanted or could afford the player.[217] FFP artificially limits the demand on the transfer market.

Since the demand of the market will be artificially limited, the amount paid for transfers, and the player's salaries, will also be restricted artificially.[218] UEFA has even admitted that "decreas[ing] pressure on salaries and transfer fees and limit inflationary effect" is one of the principal objectives of this agreement.[219] The result of the capped demand will be fewer transfers.[220] Since there are fewer transfers taking place, there are fewer transfers agents can make a profit from. The transfers that do happen will be at a lower monetary amount than before FFP regulations.[221] During the summer transfer window in 2013, FFP prevented Chelsea FC from buying two key players, Radamel Falcao and Edinson Cavani. The manager, Jose Mourinho, said that FFP ended the club's interest in these two players who moved to other clubs over the 2013 summer transfer window. Before FFP, the billionaire owner, Roman Abramovich, would have been free to personally invest in those players.[222]

FFP negatively affects the competitive conditions of the market because the regulations cap the monetary amount and thus limit the ability to compete. The artificial ceiling limiting the demand and supply of the market is one of the strongest arguments that FFP affects competition, and is therefore illegal under Article 101(1).

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217 Zach Woosley, *Manchester City working against time, financial rules to sign Radamel Falcao*, SB NATION (Aug. 31, 2014), http://www.sbnation.com/soccer/2014/8/31/6090237/manchester-city-radamel-falcao-transfer-rumor-as-monaco; *Transfer Deadline Day: 10 Biggest Premier League Moves That Could Happen*, TELEGRAPH (Aug. 31, 2014), http://www.telegraph.co.uk/sport/football/picturegalleries/11067290/Transfer-deadline-day-10-biggest-Premier-League-moves-that-could-happen.html; *see* Tom Sheen, *Transfer deadline day: Alvaro Negredo could move from Manchester City to Valencia*, INDEPENDENT (Sept. 1, 2014), http://www.independent.co.uk/sport/football/transfers/transfer-deadline-day-alvaro-negredo-could-move-from-manchester-city-to-valencia-9703059.html.

218 VOPEL, *supra* note 202, at 15–16.

219 *Financial Fair Play*, *supra* note 65.

220 Matt Slater, *How Bosman's Lawyer is Plotting Another Football Revolution*, BBC (Oct. 1, 2013), http://www.bbc.com/sport/0/football/24333604.

221 *Mourinho: FFP Prevented Striker Moves*, *supra* note 214.

222 *See id.*

ii. Creating an Oligopoly Market

FFP also negatively affects the conditions in which competitive forces are allowed to operate on the market through a combination of the break-even principal and UEFA's public financial data exchange. Together, these two principals allow big clubs to stay big. FFP causes a self-perpetrating spiral of dominance, which could potentially form an "oligolpoly" in European football.[223]

In a highly oligopolistic market, such as European club football, there is a potential for a concentrated market because the same clubs would be competing. If European football becomes an oligopolistic market, then there is concern about the financial data clubs exchange through UEFA and how it affects the conditions the competitive forces are allowed to operate on the market.

FFP regulations require clubs to provide financials to UEFA. UEFA then releases this information to the public in an annual report.[224] This process has a potentially anti-competitive effect, similar to the anti-competitive effect found in *T-Mobile Netherlands and Others*.[225] The Court of Justice in *T-Mobile Netherlands and Others* discussed how an exchange of information about market positions and strategies of their competitors reduced the degree of uncertainty as to the operation of the market. The Court also discussed how this restriction is illegal under Article 101(1).[226] If the exchange of information is capable of removing strategic uncertainties, it restricts the competition even if the information is public.[227] Frequent exchanges of information that creates a better understanding of the market and a monitoring of deviations results in a collusive outcome.[228]

To decide if an exchange of information is restricting the market, it must first be determined whether FFP regulations will cause an oligopoly. Above, it is discussed how there is a self-perpetrating spiral of dominance, and that this arguably could cause an oligopoly. However, a counter-argument is that both small and big clubs have agreed to follow the FFP regulations, and that it is not

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223 VOPEL, *supra* note 202, at 15–16.

224 *See* BENCHMARKING REPORT, *supra* note 17, at 115.

225 EZRACHI, *supra* note 115, at 145 (citing Case C-8/ 08, T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit, 2009, C.M.L.R. 110).

226 *Id.*

227 *Id.*; Communication from the Commission (EC) No. 14.1.11, art. 93, 2011 O.J. (C 11/1).

228 *Id.* ¶ 91.

an oligopolistic market if all clubs and national associations agree.[229] The success of this argument will be depend on how the Court views the economic effect of FFP on the market—whether the Court sees the economic effects of FFP as resulting in an oligopolistic European club football market.

If it is decided that European club football is an oligopolistic market, the next step is to determine whether the break-even principal and the information UEFA publicly distributes in its benchmarking report removes a great deal of uncertainty from the market.[230] UEFA specifically references and distributes the net earnings, wages and other personnel costs, long-term investments costs, operating costs, and revenue streams of the top twenty-five ranked clubs in UEFA.[231] This public information, in combination with the break-even principle, and the limit on the maximum amount a club can spend, can lead to educated guesses on how much money a club could potentially spend on transfer fees and new player wages. Because owners are not allowed to inject their own money into the market, uncertainties are removed in the transfer market.

In *Vereeniging Van Cementhandelaren v Commission*, the Court of Justice decided that fixing a price "affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be."[232] The fixing of a price here is the break-even principal, which is the maximum price that teams can pay. There will be a reasonable certainty of what transfer policy each club will undertake during each transfer window. Clubs will be aware of how much other clubs can pay, and it is often known or released what type of players clubs are looking for.[233] In addition, fixing the price will create reasonable certainty that clubs will have to sell players in order to comply with FFP regulations. For example, when Manchester City attempted to buy Radamel Falcao in the 2014 summer

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229 *See supra* Part I.B.ii.

230 UNION OF EUR. FOOTBALL ASS'NS, BENCHMARKING REPORT ON THE CLUBS QUALIFIED AND LICENSED TO COMPETE IN THE UEFA COMPETITION SEASON 2013/14 (2013), http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/99/91/07/1999107_DOWNLOAD.pdf.

231 *Id.* at 3, 34–50. Of course, the oligarchy could be considered a smaller number of these twenty-five clubs.

232 EZRACHI, *supra* note 115, at 133 (citing Case 8/72, Vereeniging Van Cementhandelaren v. Commission, 1973, E.C.R. 977 at para. 21).

233 As in any sport, there is speculation of what players are needed due to gaps in the team during the previous season or other players leaving the team requiring the team to look for replacements. Also, transfer fees are almost always released to the public. *See generally Transfer deadline day: Radamel Falcao, Daley Blind and Danny Welbeck moves—live!*, THE GUARDIAN (Sept. 1, 2014), http://www.theguardian.com/football/live/2014/sep/01/transfer-deadline-day-live.

transfer window, it was known that Manchester City would have to sell other players in order to comply with FFP.[234] Pundits were also certain which players would be sold.[235] If Manchester City was able to sign Falcao, other clubs would have known exactly what price Manchester City would have to sell the other players and would likely pay no more than that price. This certainty will have a deflationary effect on the level of players' transfer fees, which consequently will have a deflationary effect on the revenues of players' agents.[236]

FFP makes this possible by requiring teams to report all financials.[237] If FFP just required clubs to report the debts the club is accountable for, there may be a different outcome, which will be discussed later in this Comment.[238] When only debts are reported, it is more difficult to make an educated guess about the break-even point for a club. It is the combination of the break-even principal and the public report of all club financials that removes the uncertainties from the market and creates a deflationary effect on the transfer market. UEFA has even admitted that "decreas[ing] pressure on salaries and transfer fees and limit[ing] inflationary effect" is one of the principal objectives of this agreement.[239] This objective has a negative impact on competition.

C. Effect on Players' Wages and Clubs' Ability to Compete

One of FFP's objectives is to limit the inflation of players' wages.[240] However, FFP will actually lower players' wages.[241] Players will be worse off under FFP because their salaries will be capped at the amount that FFP allows clubs to spend, which cannot exceed the football-related revenue.[242] As a

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234 In part this was due to Manchester City being forced to comply with FFP sanctions of how much they could spend in the summer transfer window. Regardless, of the sanction it still would have been estimated by pundits of how much and who Manchester City would have to sell to buy Falcao. *See* Woosley, *supra* note 217.

235 *Id.*; Rob Pollard, *Radamel Falcao Replacing Alvaro Negredo Would Improve Manchester City*, BLEACHER REP. (Aug. 31, 2014), http://bleacherreport.com/articles/2182208-radamel-falcao-replacing-alvaro-negredo-would-improve-manchester-city.

236 Ed Thompson, *Legal Challenge to UEFA FFP Rules by 'Bosman' Lawyer*, FIN. FAIR PLAY (May 9, 2013), http://www.financialfairplay.co.uk/latest-news/legal-challenge-to-uefa-ffp-rules-by-bosman-lawyer.

237 FFP Regulations, *supra* note 46.

238 *Infra* Part V.

239 *See* UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/protecting-the-game/club-licensing-and-financial-fair-play/index.html (last visited Dec. 4, 2014).

240 VOPEL, *supra* note 202, at 13.

241 Thompson, *supra* note 88.

242 VOPEL, *supra* note 202, at 14; FFP Regulations, *supra* note 46, art. 61.

result, smaller clubs will be unable to afford higher wage players. Additionally, since there is a limited number of big clubs, there will only be so much football-related revenue with which to pay the players, and this will further restrict wages.[243] Overall, there will be a net decline in the wage payroll.[244] It has been estimated that FFP will lower wages fourteen to twenty-three percent.[245] The market for players' wages will have an artificial ceiling.[246]

In addition, FFP essentially places a limitation on the demand for players; FFP caps the demand for players by only allowing clubs to pay for players with football-related revenue.[247] Chelsea FC manager Jose Mourinho admitted that FFP was the reason Chelsea FC chose to not pursue certain players during the 2013 summer transfer window.[248] In the 2014 summer transfer window, Paris Saint-Germain declined to sign Angel Di Maria, because the requested transfer price was too expensive under FFP.[249] Clubs will now only be able to buy a limited number of players in the transfer window. This number will depend on how many players they can sell and if they can make any profit on those players.[250] Thus, there will be fewer transfers.[251] This re-enforcing cycle will lessen the demand for players artificially, which will affect the money agents received from transfers. The re-enforcing cycle of clubs wanting players, but unable to buy them and stay in conformity with FFP will affect the small clubs more than big clubs, because big clubs will have more football-related revenue to spend.[252] This creates an unequal market for the best

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243 VOPEL, *supra* note 202, at 11.

244 Thomas Peeters & Stefan Szymanski, VERTICAL RESTRAINTS IN SOCCER: FINANCIAL FAIR PLAY AND THE ENGLISH PREMIER LEAGUE 25 (2012), http://www.soccernomics-agency.com/wordpress/wp-content/uploads/2013/01/Peeters-Szymanski-Financial-Fair-Play-WP.pdf.

245 *Id.*

246 Chelsea FC manager, Jose Mourinho, admitted that a player's wage is a factor when deciding to buy a player, due to the financial restrictions from FFP. Additionally, Manchester United has a policy to include a pay cut of up to 25% if the club fails to qualify for the Champions League. Manchester United introduced this policy in 2011. This policy was most likely introduced to make sure that Manchester United can meet the break-even provision. *See Mourinho: FFP Prevented Striker Moves*, *supra* note 214; *ManU Players Could Face Wage Drop If Club Fails To Qualify For Champions League*, SPORTSBUSINESS GLOBAL (Jan. 10, 2014), http://www.sportsbusinessdaily.com/Global/Issues/2014/01/10/Finance/ManU-Wages.aspx?hl=financial%20fair%20play&sc=0.

247 VOPEL, *supra* note 202, at 13–14.

248 Mourinho, *supra* note 214.

249 Conn, *supra* note 215.

250 If a player increases in value between acquiring and selling the player, FFP will consider that football-related revenue. *See* Vopel, *supra* note 202, at 13–14.

251 Matt Slater, *How Bosman's lawyer is plotting another football revolution*, BBC (Oct. 1, 2013), http://www.bbc.com/sport/0/football/24333604.

252 The big clubs will earn more football related revenue, so those clubs will be able to spend more money under the break-even provision. *See supra* Part I.C.

players, a market that makes it impossible for small clubs to compete with the big clubs. The way the owners' of Manchester City or Chelsea FC used their personal money to invest in long-term success for their club is no longer an option.[253] The competitive balance of this market is weakened, as the smaller clubs are forbidden to compete with clubs that have access to the wealth of European football.

Due to a lack of external investment, smaller clubs with less football-related revenue will never be able to afford higher wage players. Unable to afford higher wage or better producing players will prevent smaller clubs from investing in long-term success,[254] since they need those higher wage and better quality players to reach the European club level. The smaller clubs are not able to catch up with the bigger clubs competing in European football, without some sort of external funding.[255] FFP will protect the bigger clubs by letting only them afford better quality players.[256] That is why smaller clubs like Southampton lose many of their star quality players to bigger clubs.[257]

Under FFP, smaller clubs cannot be invested in, which weakens the competitive balance between clubs. Without investment, the smaller clubs cannot realistically compete with bigger clubs to gain spots in the higher revenue competitions. A gap is created between the small and big clubs of the league. The big clubs dominant league position will be enhanced,[258] which, in essence, results in the smaller clubs from being able to compete.

Due to the smaller clubs being forbidden to compete with the bigger clubs, there is a clear anti-competitive effect on the market and thus FFP is illegal under Article 101(1).

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253 *See supra* Part III.C.ii.a. Over the last decade, Russian billionaire Roman Abramovich invested money into Chelsea FC to bring the club from a mid-table club to a club that consistently finishes in the top four of the Premier League. *Bruce Buck: 'Roman has great ambition and is as fervent a Chelsea fan as any you Will Meet in the Pub*, THE TIMES (July 1, 2013, 12:01 AM), http://www.thetimes.co.uk/tto/sport/football/clubs/chelsea/article3804299.ece?CMP=OTH-gnws-standard-2013_06_30.

254 Vopel, *supra* note 202, at 11.

255 *See id.* at 17–18.

256 Simon Yeend, *Now Arsene Wenger feels he's on the money at Arsenal*, EXPRESS (Aug. 2, 2014), http://www.express.co.uk/sport/football/494584/Now-Arsene-Wenger-feels-he-s-on-the-money-at-Arsenal.

257 *See id.* In the 2014 summer transfer window, Southampton, despite being a Premier League club, experienced an exodus of players searching for European-level football. *Id.*; *see FFP to blame for Southampton exodus*, FOOTYPLACE (July 30, 2014), http://www.footyplace.com/features/ffp-to-blame-for-southampton-exodus-0730298110.

258 VOPEL, *supra* note 202, at 18.

D. Possible Defenses

As shown above, FFP has a clear negative impact on competition. There are several exemptions that allow agreements that violate Article 101(1) to stand.[259] The exemptions include the exceptions noted in Article 101(3), an ancillary restraint exemption, and the de minimus exemption.[260] Each of these will be taken in turn, and will be explained why they do not apply to FFP.

1. Article 101(3)

Article 101(3) notes two types of exemptions that will cause agreements to be exempted from Article 101(1). The first exception is the vertical block exception. This exemption applies to only to vertical agreements.[261]

For the vertical block exception to even be looked at it depends on whether FFP will be characterized as a vertical or horizontal agreement. Therefore, there first must be a discussion about whether FFP fits the characteristics of a vertical or horizontal agreement.[262] FFP could be considered a horizontal agreement between suppliers—the clubs and football associations.[263] While FFP could also be considered a horizontal agreement, it is also argued that FFP could be considered a vertical restraint.[264] FFP would be considered a vertical restraint, because UEFA is more of a governing body. In 2004, UEFA imposed a club licensing system that requires clubs to meet a certain set of standards, which is characteristic of vertical restraints.[265] For the vertical block exception to be examined, it depends on how FFP will be characterized: as a vertical or horizontal agreement.

If FFP is characterized as a vertical agreement, one must look at how much of the market the agreement concerns.[266] If the agreement concerns more than thirty percent of the market share, then this exception does not apply.[267] Under

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259 EZRACHI, *supra* note 115, at 53–54.

260 *Id.*

261 Commission Regulation 330/2010, On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, 2010 O.J. (L 102/1) 4 [hereinafter Application of Article 101(3)].

262 THOMAS PEETERS & STEFAN SZYMANSKI, VERTICAL RESTRAINTS IN SOCCER: FINANCIAL FAIR PLAY AND THE ENGLISH PREMIER LEAGUE 7 (Univ. of Antwerp, Faculty of Applied Economics, Paper No. 028, 2012).

263 *See* Weatherill, *supra* note 154.

264 PEETERS & SZYMANSKI, *supra* note 244, at 7.

265 *Id.* at 2.

266 Application of Article 101(3), *supra* note 261, at 2.

267 *Id.* at 6.

the definition of market discussed earlier in this Comment,[268] FFP does affect more than thirty percent of the market share, as FFP and UEFA concern almost the totality of the European-wide club competitions.[269] Therefore, the vertical block exemption will not apply to FFP.

The second exemption under Article 101(3) is if the European Commission, National Competition Agencies, or National Courts deems an agreement does not violate Article 101(1) because the agreement meets four requirements:

1. the agreement contributes to improving the production or distribution of goods or promotes technical or economic progress;
2. allows consumers a fair share of the resulting benefit;
3. does not impose restrictions which are not indispensable to the attainment of these objectives;
4. does not eliminate competition in respect of a substantial part of the products in question.[270]

FFP fails to meet three of the four requirements. The first requirement is fulfilled by FFP, 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.[271] FFP is encouraging economic progress.

The second requirement of allowing consumers a fair share of the resulting benefit is not met. While the club's financial footing may be on steadier ground, consumers do not receive any direct benefit regarding their experience watching the clubs, paying for tickets, or merchandise.[272] If anything, consumers will have to pay more for tickets or merchandise, because clubs will want to have more money from football-related revenue to be in conformity with the break-even provision.[273]

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268 *See supra* Part II.

269 *Supra* Part II.

270 EZRACHI, *supra* note 115, at 55.

271 *Financial Fair Play*, *supra* note 17.

272 *See* Jonathan Johnson, *How Paris Saint-Germain and Monaco Will Beat Financial Fair Play*, BLEACHER REP. (Aug. 28, 2013), http://bleacherreport.com/articles/1753485-how-paris-saint-germain-and-monaco-will-beat-financial-fairplay.

273 *Id.*; *see also Premier League Clubs Continue Ticket Price Raises*, WHEN SATURDAY COMES (July 23, 2014), http://www.wsc.co.uk/wsc-daily/1184-july-2014/11771-premier-league-clubs-continue-ticket-price-rises.

The third condition of not imposing restrictions that are indispensable to the attainment of these objectives is also not met. There are other less restrictive ways of achieving the goals of FFP without the break-even provision, which will be discussed later in this Comment.[274]

The last requirement is that the agreement does not eliminate competition of a substantial part of the products in question is also not met. FFP, as discussed earlier, will restrict the competition between clubs of the raw goods, the players.[275] The competition will be restricted to the few clubs who are already at the elite level of the Champions League football, and the break-even provision is preventing owners to inject their own money to compete with those clubs to achieve that elite level, as shown by Manchester City discussed earlier.[276] Thus, because the FFP regulations do not meet all four requirements, FFP do not qualify under the vertical block exemption.

2. *Ancillary Restraint*

The second exemption that may be brought up to defend FFP is the ancillary restraint defense; if an agreement restrains competition, but the regulation is proportionate, as well as ancillary to legitimate commercial venture and is really necessary, then the agreement falls outside of Article 101(1).[277] This is the argument that UEFA most likely will use claim that FFP is legal, and is UEFA's strongest defense.

When determining if a regulation is an ancillary restraint, the agreement and its affects must be looked within the overall context of the decision by an association of undertakings, per *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*.[278] The Court needs to weigh anticompetitive effects against a range of non-economic policy variables, and public interest analysis is part of this analysis, following *Wouters*.[279]

FFPs non-economic policy variables are FFP's objectives to protect the long-term viability of European club football; to introduce more discipline and

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274 *See infra* Part V.

275 *See generally* C-415/93, Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman, 1995 E.C.R. I-4921.

276 *See supra* Part III.B.ii.a.

277 LANE, *supra* note 129, at 129.

278 EZRACHI, *supra* note 115, at 103 (C-309/99, Wouters v Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577 at para. 97).

279 *Id.* at 104.

rationality in club football finances; and to encourage clubs to compete within their revenues.[280] The overall objective may be inherent in the organization and conduct of sports; however, the FFP regulations, especially the break-even provision, are not inherent in the justified objective.[281] FFP is not the only way to achieve UEFA's objectives. There are other ways to introduce more discipline and rationality in club football finance, which will be discussed later.[282]

Additionally, even if FFP was inherently part of the FFP objective, the FFP regulations are not proportionate. According to the *Meca-Medina and Majcen v Commission* judgment specified in regards to sporting restrictions, "the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport," following the less restrictive means necessary test in *Bosman*.[283] The ECJ later found that if a rule is not required to attain a particular objective, then that rule is not necessary.[284]

FFP restrictions do go beyond what is necessary for football clubs to conduct proper economic practices.[285] For example, FFP does not allow owners to spend their personal money to avoid increasing the club's debt.[286] Smaller clubs cannot invest as Manchester City did to improve their standing, reach European Football, and earn more money. Thus, FFP is not the least harmful way to achieve financial stability in football. There are alternatives available to achieve financial stability in football;[287] FFP is overly restrictive. FFP is not necessary.

While FFP is not necessary, due to the recent financial behavior of clubs,[288] their irresponsible financial behavior must be fixed through some sort of regulation. The stated objectives of FFP, to achieve financial stability in football, are legitimate and within the public interest. Lesser restrictive

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280 *Financial Fair Play*, *supra* note 17.

281 *Commission White Paper on Sport*, at 14 COM (2007) 391 final (July 11, 2007), http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0391en01.pdf; *see* EZRACHI, *supra* note 115, at 97 (citing Case C-519/ 04P, Meca-Medina and Majcen v Commission 2006 E.C.R. I-699).

282 *Infra* Part V.

283 EZRACHI, *supra* note 115, at 97 (Citing Case C-519/04P, Meca-Medina and Majcen v. Commission 2006 E.C.R. I-699 ¶ 47).

284 Case C-325/08, Olympique Lyonnais SASP v. Bernard, 2010 EUR-Lex LEXIS 113 (Mar. 16, 2010) ¶ 49–50.

285 *Infra* Part V.

286 *See* FFP Regulations, *supra* note 43, art. 61.

287 *Infra* Part V.

288 *Supra* Introduction.

regulations than FFP will fall within this exemption and should replace the current FFP regulations to produce financial stability desired.[289] For example, there could be a requirement that clubs cannot have a certain amount of debt per season, where the club gets the money to spend is not relevant, but a club cannot have more than a certain amount of debt at a time. Other examples of lesser restrictive regulations will be expanded on later in this Comment.[290] Therefore, the ancillary restraint defense will not work.

3. De Minimus

The last defense that could claim that FFP does not violate Article 101(1) is the de minimus defense, which states that the agreement does not have an appreciable effect on competition or on trade between member states of the EU.[291] If the agreement has an insignificant effect on the market, then the agreement does not fall under Article 101(1).[292]

FFP has a strong affect on the defined market. FFP will affect every club that wants to play European football, because each club must meet FFP requirements to acquire the license needed to play European football.[293] Therefore, the de minimus defense will not apply here.

IV. ARTICLE 102

To infringe on Article 102, there are three elements to be satisfied. First, there is conduct done by a single undertaking in a dominant position.[294] Second, the conduct must affect a substantial amount of the market.[295] Third, the undertaking, due to its dominant position, is abusively exploitative.[296] Each of these requirements will be considered in turn.

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289 *Infra* Part V.
290 *Id.*
291 EZRACHI, *supra* note 115, at 54.
292 *Id.* at 105 (citing Joined Cases T-374, 375, 384, 388/ 94 European Night Servs. Ltd. v. Comm'n 1998 ECR II-3141 ¶ 102).
293 *Supra* Part I.D.; FFP Regulations, *supra* note 43, at 12–13.
294 LANE, *supra* note 129, at 139.
295 EZRACHI, *supra* note 115, at 166.
296 KORAH, *supra* note 125, at 6.

A. Single Undertaking

Article 102 only covers unilateral conduct activity by one undertaking.[297] Recent Commission decisions have found if there is a collective dominance between undertakings then they are also subject to Article 102.[298] Collective dominance may be established when two or more undertakings act together from one economic point of view as a collective entity.[299]

UEFA can be considered an undertaking, not an association of undertakings because UEFA produces its own product—European Football competitions—as well as controls the national competitions and receives money from these actions.[300] UEFA controls the prize money, regulations, and media rights to those competitions.[301] Additionally, UEFA makes its own decisions through its congress and other committees.[302] These economic actions and activities should be enough to declare UEFA as an undertaking itself, instead of an association of undertakings, due to the Court of Justice's view that an undertaking is an entity that engages in an economic activity itself.[303]

Alternatively, it can be argued that the national football associations, along with UEFA, have enough collective dominance to fall under Article 102. The Court of Justice held in *Compagnie Maritime Belge Transports v Commission* that collective dominance is when different undertakings have the same economic point of view and act together on a particular market as a collective entity.[304] Additionally, the Court of Justice clarified that there must be so much linkage between the undertakings that the undertakings must present themselves on the market as a collective entity, even if there was an absence of agreement.[305] Collective dominance can be established through the existence of an agreement or other links between the undertakings, or an economic

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297 LANE, *supra* note 129, at 139–40.

298 *Id.* at 141.

299 EZRACHI, *supra* note 115, at 267 (citing Joined Cases T-374, 375, 384, 388/ 94 European Night Servs.. Ltd. and Others v. Comm'n 1998 ECR II-3141 ¶ 102).

300 *UEFA Champions League revenue distribution*, UNION OF EUR. FOOTBALL ASS'NS (Sept. 12, 2012, 4:15 PM), http://www.uefa.com/uefachampionsleague/news/newsid=1858497.html.

301 The competitions are Champions League, Europa League, the SuperCup, and various Youth Competitions. UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.com (last visited Dec. 15, 2014).

302 *About UEFA*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/index.html (last visited Nov. 11, 2014).

303 Case C-67/96, Albany v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5751.

304 Case C-395/96, Compagnie Belge Transports v. Comm'n, 1996 E.C.R. I-1201, 1458.

305 *Id.*

assessment of the structure of the market and the way in which undertakings interact in the market in question.[306]

In this case, the undertakings establishing collective dominance would be the different nations' football associations, along with UEFA. The structure of the market implies collective dominance, similar to *Piau v Commission*, where it was found players' agents may be excluded from the market by FIFA if found to be breaking FIFA's rules,[307] similar to how this Comment discusses how clubs are sanctioned by UEFA if found breaking FFP regulations. UEFA like FIFA is "the emanation of the national associations and the clubs . . . ."[308] UEFA has power in respect of clubs' economic activities, like FIFA; this market structure screams collective dominance.

Additionally, there are many links between the football associations and UEFA. The purpose of UEFA is to work with and on the behalf of these football associations.[309] In addition, for UEFA to pass any major initiatives, such as FFP, it must be approved by UEFA's Executive Committee and elected by UEFA's Congress, which is comprised of one member for each football association.[310] This establishes how UEFA, an independent economic entity itself, is linked to the national football associations.

Through UEFA, the football associations act together on a particular market as a collective entity. This is shown through the varying initiatives that UEFA has implemented which are identical to the initiatives individual national football associations have implemented.[311] For example, both UEFA and individual football associations have been fighting racism in football.[312] UEFA has had the initiative "European Football United Against Racism" in 2013, while England's Football Association has the initiative "Kick it Out" for

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306 Case T-193/02, Piau v. Comm'n, 2005 E.C.R. II-217, 221, 236; *see also* Erika Szyszczak, *Controlling Dominance in European Markets,* 33 FORDHAM INT'L L.J. 1738, 1769 (2010).

307 *Piau*, *supra* note 306, at 221.

308 *Id.* at 252.

309 *Overview*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/history/index.html (last visited Nov. 11, 2014).

310 *About UEFA*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/index.html (last visited Nov. 11, 2014).

311 *Race Equality*, THE FOOTBALL ASS'N, http://www.thefa.com/football-rules-governance/equality/race-equality; *Tackling Racism and Discrimination in Sport: Guide of Promising Practice, Initiatives and Activities*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., http://fra.europa.eu/sites/default/files/guide-tackling-racism-in-sport_en.pdf; *see Overview*, UNION OF EUR. FOOTBALL ASS'NS http://www.uefa.org/aboutuefa/organisation/history/index.html.

312 *Race Equality*, *supra* note 311; *Tackling Racism and Discrimination in Sport*, *supra* note 311; *see Overview*, *supra* note 311.

the last twenty years, and Romania had a three day campaign against racism in 2006 called "Racism Breaks the Game."[313] This exemplifies the common policy of the various football associations and UEFA.

FFP is just another example of the use of the collective dominance of the national Football Associations, and UEFA. While this Comment is addressing UEFA's Financial Fair Play, there have been similar initiatives concerning the financial stability of football clubs by the national football associations of France and Germany in place for the past several years, and England implemented their version in 2013,[314] which demonstrates the linkage and how various national football associations and UEFA act as one economic entity on the European football market.

If FFP is seen as having a vertical economic effect, it can be argued that the national football associations and UEFA do not have collective dominance due to the vertical commercial relationship between football associations and UEFA—UEFA providing European competitions for the clubs who are part of the national football associations that form UEFA, or the regulatory control that UEFA retains over the national football associations. This could be considered a vertical relationship, due to hierarchal nature of the regulatory body.[315] However, even if the Court decides that there is a vertical commercial relationship, the Court of First Instance has found in *Irish Sugar v Commission* that a vertical commercial relationship does not affect the finding of a joint dominant position, as long as the undertakings are not integrated to the extent of being considered one undertaking.[316] As established above, it is clear UEFA can be considered a separate economic entity from the national football associations because the football associations retain economic independence from UEFA.[317]

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313 *Race Equality*, *supra* note 311; *Tackling Racism and Discrimination in Sport*, *supra* note 311; *see Overview*, *supra* note 311.

314 *Supra* Part II. The English Football Association has recently put into place a similar initiative, based on the FFP rules. *See* David Conn, *New Premier League Rules Derived from Self-interest, Not Fair Play*, THE GUARDIAN (Feb. 7, 2013), http://www.theguardian.com/football/blog/2013/feb/07/premier-league-self-interest-fair-play; *Premier League Agrees New Financial Regulations*, BBC SPORT (Feb. 8, 2013, 9:17 AM), http://www.bbc.com/sport/0/football/21374699; *see* Owen Gibson, *Richard Scudamore: Financial Fair Play Rules Unsustainable in Present Form,* THE GUARDIAN (Mar. 14, 2014, 1:27 PM), http://www.theguardian.com/football/2014/mar/14/financial-fair-play-rules-unsustainable-richard-scudamore-premier-league.

315 However, as discussed above this relationship may be viewed instead as horizontal between different clubs and football associations. *See supra* Part III.

316 Case T-228/97, Irish Sugar plc v. Comm'n, 1999 E.C.R. II-2975, 3004-05.

317 *See* HOLT, *supra* note 27, at 114.

It is also arguable that since football associations have voting power in UEFA, that the football associations, not a separate entity, control UEFA. However, there are influences outside of the football associations that have bearing on UEFA's decisions. There are various committees that submit advice, proposals and recommendations to UEFA's Executive Committee, which makes the final decisions.[318] Some examples of these committees include the Football Committee (composed of the leagues), the Club Competitions Committee (composed largely of clubs), and the Players' Status, Transfer and Agents and Match Agents Committee (composed of clubs and players' unions).[319] These Committees show that as with any other governing body, there are external influences that affect UEFA's decisions, and due to these external influences, the national football associations do not have the only voice in UEFA's actions.

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.

B. Conduct Affecting a Substantial Part of the Market

To find an Article 102 violation, it is necessary to consider whether the conduct of the collective dominance or the undertaking affects a substantial part of the internal market.[320] As shown earlier, European football is the only European wide club football competition and there is a substantial amount of money involved through broadcasting contracts and prize money.[321] Through the geographic reach and the amount of money involved, it is clear that there is a substantial part of the market involved.[322]

C. Dominant Position is Abusively Exploitative

An abuse of a dominant position is when the undertaking, or the collective dominance, influences the structure of the market such that because of the very presence of the undertaking or the collective dominance, the degree of

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318 *Committees and panels*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/committees-panels/index.html (last visited Nov. 11, 2014).

319 *Id.*

320 EZRACHI, *supra* note 115, at 166.

321 *See supra* Part I.C.

322 *See* EZRACHI, *supra* note 115, at 185 (citing Joined Cases 40-48, 50, 54-56, 111, 113, 114/73, Suiker Unie and Others v. Comm'n 1975 E.C.R 1663).

competition weakens.[323] This Comment will explore in turn 1) if the Court finds collective dominance, how the collective dominance weakens the market, 2) if the Court finds there is a single undertaking, how the single undertaking influences the market and weakens competition. Under either argument, there is an Article 102 violation.

1. *The Collective Dominance Being Abusively Exploitative of the Market Weakens the Market*

If we take the view that there is collective dominance, UEFA and the national football associations abused their position when establishing FFP by establishing unfair market competitions that exclude smaller leagues and clubs from playing at the European club level.[324] When looking at the exclusion within a market, the best way to analyze the anti-competitiveness of FFP is an effect-based analysis of the market.[325] In 2005, the EU commission published a consultation paper, titled "An Economic Approach to [Article 102 TFEU]" that discusses an effect-based approach to competition law.[326] The paper discusses how the effects of the anticompetitive conduct and the competitive harm should be examined.[327] To do this, there needs to be proof of actual economic harm based on facts.[328] Therefore, the effects of FFP will be examined by analyzing how FFP is excluding smaller leagues from the European competition club market, due to the inability of clubs from smaller leagues to improve the coefficient needed to reach European football under FFP.

UEFA and those top national football associations, by establishing FFP, are using their dominant position to weaken the competition in the market by only allowing certain clubs the ability to compete and afford multiple key players. As discussed earlier, the market will be entrenched, which will not allow smaller clubs to have the necessary financial means to buy better, more expensive players in order to make that leap to being a bigger club.[329] FFP

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323 *Id.* at 167.

324 Smaller leagues or clubs are a common term used to describe weaker leagues or clubs. Big clubs or big leagues will be used to refer to leagues or clubs that have been traditionally considered strong, such as the English Premier League, or Real Madrid.

325 *See* EZRACHI, *supra* note 115, at 173.

326 *Id.* This paper is not binding, but "has stimulated the debate over the realm of Article 102 TFEU," implying the influence this paper has when analyzing Article 102. *Id.*

327 Jordi Gual et al., *Report by the EAGCP: An Economic Approach to Article 82*, ECON. ADVISORY GROUP ON COMPETITION POL'Y OF THE EUR. COMM'N, 2 (July 2005), http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

328 *Id.*

329 *Supra* Part I.C.

creates an artificial barrier preventing smaller clubs from reaching the financial capability of the larger clubs, which in turn creates a barrier between smaller leagues, and the ability of smaller leagues to grow into a big league.[330]

Before FFP, smaller clubs and leagues could improve their position, which led to greater revenue and the ability to grow into a 'big' league. For example, Ligue 1, the top French league has grown in the past decade. Until 2009, Lyon dominated Ligue 1, but recently, Ligue 1 has become more competitive, in part because of the external investment in Paris Saint-Germain.[331] The investment in PSG raised interest in Ligue 1 and incentivized other clubs to raise their game to try and stay competitive with PSG.[332] That strengthens Ligue 1 in general, and the increased competition leads to increased interest internationally, which leads to new markets, increased jersey sales, and more revenue from television rights.[333]

Ligue 1 would not have been able to raise interest in their league under the FFP rules, due to the lack of external investment. Under UEFA's coefficient, only one or two Champions League spots are given to the weaker leagues, such as the Scottish or Dutch leagues.[334] Now under the FFP rules, only a few clubs have the financial means, under the break-even rule, to strengthen their squad and improve to be a bigger club.[335] All the other clubs in those weaker leagues lack the financial means to strengthen their squad and be in a position to receive the license required to play in the European football. Since clubs lack the financial means to strengthen their squad, the league as a whole cannot get more competitive and reach the level of the English Premier League or La Liga.

The collective dominance of the larger national associations and leagues excludes the smaller clubs and the smaller leagues from the European football market by instituting FFP. FFP weakens competition by keeping the weaker

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330 *Supra* Part I.C.

331 Jonathan Johnson, *Why French Ligue 1 Deserves More of Our Attention*, BLEACHER REP. (Jan. 18, 2013), http://bleacherreport.com/articles/1490231-why-french-ligue-1-deserves-more-of-our-attention/; *see also* ALL TO PLAY FOR, *supra* note 164, at 18.

332 Johnson, *supra* note 331; *see also* Christopher Almeras, *Could Ligue 1's Growing South American Influence Change the French Game?*, BLEACHER REP. (Sept. 12, 2012), http://bleacherreport.com/articles/1331836-could-ligue-1s-growing-south-american-influence-change-the-french-game.

333 Almeras, *supra* note 175.

334 *Country Coefficients 2013/14*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.com/memberassociations/uefarankings/country/ (last visited Nov. 11, 2014).

335 The prize and broadcasting money that comes from competing in European football. *See supra* Part I.C.

leagues weak. This is because the weaker leagues will continue to stay small, so there will be less competition for players and sponsorship rights, which additionally weakens competition.

The biggest weakness with this argument is that the weaker leagues agreed to FFP through the hierarchal nature of the national football associations.[336] However, a counter-argument to this weakness is that the smaller leagues do not have as much say as the larger leagues concerning these types of agreements.[337] One example of this is the influence of the European Club Association, who approved FFP.[338] ECA's membership consists of the strongest clubs from each country based on the UEFA coefficient, with representation increasing if a club won some sort of European trophy, played in the Group Stage of the Champions League, or qualified for the Champions League or the Europa League three times in the past five years.[339] The stronger leagues, like the Premier League or La Liga, have many more representatives than the smaller leagues like Ukraine or Bulgaria's league.[340] It is plain that the larger leagues have much more say than smaller leagues do, even though every UEFA member has at least one member club part of the ECA.[341] Additionally, FFP only needed approval from the Executive Committee, not UEFA's Congress.[342]

So while the smaller leagues cannot lodge a complaint against FFP directly,[343] since they technically agreed to the FFP rules through the hierarchal nature of the regulatory bodies, the smaller leagues are not in reality part of the collective dominance, as they were so far from the decision making process. The collective dominance of the larger national associations and leagues excludes the smaller clubs from the European football market and proves FFP is anticompetitive.

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336 *See supra* Part I.A.

337 *See generally* Scott, *supra* note 37.

338 *See id*. (noting that the European clubs have threatened to break away from FIFA and UEFA unless their concerns over international financing conditions are met).

339 *ECA Membership*, EUR. CLUB ASS'N, http://www.ecaeurope.com/about-eca/eca-membership/ (last visited Nov. 11, 2014).

340 *See id.*; Scott, *supra* note 37.

341 *See ECA Membership*, *supra* note 339; *see* Scott, *supra* note 37.

342 The Executive Committee is composed of only fifteen members elected by the UEFA Congress and has the overall control of UEFA. *UEFA Executive Committee*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/executive-committee/index.html. UEFA Congress is composed of all member associations. *UEFA Congress*, UNION OF EUR. FOOTBALL ASS'NS, http://www.uefa.org/about-uefa/organisation/congress/index.html (last visited Nov. 11, 2014).

343 However, an outside party like a player's agent who lodges a complaint can use this as an argument.

2. *The Single Undertaking, UEFA Uses its Dominant Position To Weaken Markets*

Another way FFP violates Article 102 is exclusion in adjacent markets, as discussed by the Commission in the 2005 consultation paper.[344] If taking the view that UEFA is an undertaking itself, FFP influencing the structure of adjacent markets is the strongest argument that FFP is violating Article 102. When discussing FFP, this would be the European club market and the adjacent or sub-market would be the domestic club market, the national leagues. As stated in the consultation paper, the key to proving competitive harm in an adjacent market is to show linkage between the markets that place some rivals at a competitive disadvantage.[345] Now, this Comment will analyze how FFP affects the domestic club markets.[346]

FFP affects clubs in the domestic club leagues who are not required to follow FFP. Clubs who did not qualify for European football are not required to follow FFP rules, however if a club improves to a qualifying European football position, but is not following FFP, the club will not receive the license required to compete in European football.[347] The club's increased standing is worthless.[348] This means clubs in the lower tiers of the domestic leagues, and those clubs lower in the table of the top tier of domestic club football will feel the effects of FFP, despite not being required to follow the regulations.[349]

By dictating who can participate in UEFA competitions and who cannot, UEFA ensures that the clubs' positions in the domestic club market will be entrenched, preventing opportunities to significantly improve standing.[350] The

344 *Report by the EAGCP*, *supra* note 327, at 17.

345 *Id.*

346 Note that FFP is only required of clubs that play in the European competitions. However, some leagues have implemented their own version of FFP. *See* FFP Regulations, *supra* note 46, at 1.

347 *See id.* at 12.

348 Increased standing but not competing in European football will be considered worthless to many fans and players, due to the amount of prestige associated with European football. *See supra* Part I.C.

349 Note that many leagues are now implementing their own version of Financial Fair Play. *See*, *e.g.*, Bryan A., *A Brief Analysis of the Premier League's New Financial Fair Play Regulations*, SBNATION (Apr. 11, 2013, 5:05 PM), http://cartilagefreecaptain.sbnation.com/2013/4/11/4212852/financial-fair-play-english-premier-league-UEFA-Scudamore.

350 For example, in the English Premier League, when looking at the final standings from the last decade, it is consistent who are in the top four, with very few exceptions: Manchester United, Arsenal, Chelsea or Liverpool—later replaced by Manchester City. In part, these clubs stayed in the top four due to the money that they received in the European competitions, and could re-invest in the club. Without external investment, the smaller clubs not in European football will not be able to be able to compete on the domestic market with the

small clubs are disallowed any realistic chance to catch up to the big clubs within the club competitions at the domestic level.[351] Small clubs will never be able to gain the same amount of broadcasting or sponsorship revenue as the big clubs; for example, Spain's two largest clubs, Real Madrid and Barcelona, receive thirty-five percent of the revenue from La Liga's television revenue.[352] The distribution of the television revenue is not evenly split or fair. There is no way for smaller clubs to achieve break-even at the same monetary amount, as the big clubs who participate in European football. Small clubs will always be at an artificial competitive disadvantage. FFP weakens the competitive balance in the domestic club markets.[353]

This argument could prove an anti-competitive effect under Article 102, but it is much weaker than the anti-competitive argument under Article 101. The Article 102 arguments' main weakness is that the smaller clubs and leagues did technically agree to FFP, through the hierarchal structure of the football regulatory structure.[354] These arguments could be saved if the smaller clubs or leagues had a legitimate choice or a voice approving FFP, but this argument depends on how the Court would view this issue, as there is no case-law available regarding a similar situation. Another difficulty with this argument is also based on an effect analysis of the clear anti-competitive effects of FFP, rather than established case law. Since this argument would be

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big clubs. *Barclays Premier League Table*, ESPNFC, http://espnfc.com/tables?league=eng.1&cc=5901 (last visited Feb. 22, 2014).

351 Due to inability to obtain external investment, smaller clubs will have weaker squads than larger clubs, which will weaken the overall level of competition in the league. The small clubs are essentially prohibited to reach the league positions that the big clubs are currently occupying. For example, the English Premier League (EPL) is known as the big four, which tend to take the top four spots in the league standings each year. For years, the big four was Manchester United, Arsenal, Chelsea and Liverpool. Recently, the big four have become the big six, with the addition of Manchester City and Tottenham Hotspurs. Under FFP, it is unlikely the big six will change in the coming years. Especially since EPL has only five European spots, and the financial rewards that come with those spots make it difficult for lower table clubs to reach the upper echelon. Andrew McKenize, *Has the Premier League's Big Four Become a Big Two?*, BBCSPORT (Aug. 13, 2010), http://news.bbc.co.uk/sport2/hi/football/eng_prem/8888167.stm; Richard Jolly, *Changing Dynamics of the 'Big Six' in Premier League Title Race*, THE NAT'L (Aug. 11, 2011), http://www.thenational.ae/sport/football/changing-dynamics-of-the-big-six-in-premier-league-title-race#full; *Alex McLeish Says Aston Villa Struggle to Compete with Top Clubs*, BBCSPORT (Sept. 8, 2011), http://www.bbc.com/sport/0/football/14844717; *Barclays Premier League Table*, ESPNFC, http://espnfc.com/tables?league=eng.1&cc=5901 (last visited Nov. 11, 2014).

352 *See supra* Part I.C.; *Spanish Football League Seeking to Balance Distribution of TV Revenue in Next Contract*, SPORTSBUSINESS GLOBAL (Feb. 25, 2014), http://www.sportsbusinessdaily.com/Global/Issues/2014/02/25/Media/La-Liga.aspx.

353 The competition within the league, as well as competition over players and sponsorships, is weakened.

354 *See supra* Part I.B.i; *supra* Part IV.B.i. This aspect of the article explains why an outside person, the player agent Straini, had to file the complaint rather than a club or a league.

much harder to hold up in court, it should only be used in the unlikely event that the Article 101 (1) argument fails.

D. Defenses

There are two potential defenses under Article 102. First, if it can be shown that the FPP has a legitimate objective, and the anti-competitive actions taken to achieve that objective generate efficiencies that outweigh the anti-competitive effects, then the Article 102 argument fails.[355] Secondly, since Article 102 arguments require an appreciable effect on trade between member states, a lack of such effects will defeat this argument.[356]

1. Objective Justification

While FFP does have a legitimate objective, its efficiencies do not outweigh its anti-competitive effects.[357] Both the Court of Justice and the European Commission have held that if the exclusionary effect goes beyond what is necessary, then the system is regarded as an abuse.[358] Again, as discussed earlier, FFP goes beyond what is necessary to achieve efficiency for the market.[359] There are better ways to achieve financial stability for clubs than FFP, as this Comment will discuss in showing that the objective justification defense will not work.[360]

2. Appreciable Effect on Trade Between Member States

An appreciable effect on trade between member states means that the conduct has the potential to affect trade between the member states of the EU.[361] FFP has the clear potential to affect trade between member states; players are commonly traded among different leagues, and the broadcasting revenues from many different countries and European club competition come from all over Europe.[362] Therefore, this defense would not apply either.

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355 EZRACHI, *supra* note 115, at 172.

356 *Id.* at 173.

357 *See supra* Part III.D.i.

358 Case C-95/04 P, British Airways v. Comm'n, 2007 E.C.R. I-2331, 2355; Case COMP/C-3/37.990, Intel [2009], O.J. C227/07, para. 1624.

359 *See supra* Part III.D.ii.

360 *See infra* Part V.

361 EZRACHI, *supra* note 115, at 264 (citing Case T-228/97, Irish Sugar plc v. Comm'n, 1999 E.C.R. II-2969).

362 *Supra* Part I.C.

V. ALTERNATIVES TO FFP

While FFP is clearly anti-competitive and illegal under EU competition law, the FFP objectives to introduce more discipline and rationality in club football finances, and to protect the long-term viability of European club football are legitimate and justified goals.[363] FFP's problem is that it is too heavily restrictive and is not necessary or proportionate to achieve these objectives.

Under *Wouters* and *Meca-Medina*, the Court of Justice found that restricting competition might not be illegal under EU competition law if the objectives of the restriction are justified.[364] In *Meca-Medina*, another case concerning sports, it was held that the restrictions may not "go beyond what is necessary in order to ensure that sporting events take place and function properly."[365] The restrictions must be objectively necessary and proportionate,[366] and FFP is not. FFP is very unlikely to be upheld in court, therefore UEFA should explore other options to achieve its goals of protecting the long-term viability of European club football.

Now, this Comment will explore what kind of regulations could replace FFP by being proportionate to the restrictions to fulfill FFP's justified objections of introducing more discipline and rationality in club football finances and fixing the financial issues of many clubs. Both Germany and France had their own version of financial fair play regulations in place before UEFA passed FFP. This Comment will consider each of these regulations in turn, along with how parts of those regulations may take the place of UEFA's FFP, and ensure legality under EU competition law. This Comment will then explain other potential ways to protect the long-term viability of European club football.

1. Germany's Financial Regulations

The national football association of Germany maintains a balanced books provision in order to receive the license required for a club to compete each

363 *Financial Fair Play*, *supra* note 18.

364 EZRACHI, *supra* note 115, at 97, 104 (citing Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1653, 1670); Weatherill, *supra* note 154.

365 EZRACHI, *supra* note 115, at 97 (citing Case C-519/04 P, Meca-Medina & Majcen v. Comm'n, 2006 E.C.R. I-7006, 7026).

366 *Id.*

year.[367] The clubs must submit financial data each year.[368] Additionally, debt levels are closely monitored to reduce the risk of insolvency, and expensive player transfers are vetoed if the transfers look unaffordable.[369]

FFP is modeled after the German model, but there is a key difference: FFP has a fair value provision for sponsorships that the German model does not have.[370] The absence of a fair value provision allows owners to inject money into the club by overpaying for sponsorship deals through another company the club owner owns. For example, Wolfsburg, a smaller club, has a shirt sponsorship deal with Volkswagen, which is also owned by the club's owner, worth €20 million a year, similar to shirt sponsorship deals for clubs like Liverpool FC or Bayern Munich.[371] The German model does not penalize owners for these types of deals, unlike FFP. FFP has in place a fair value provision to avoid injections of this sort by owners.[372]

The fair value provision requires that transactions with related parties be carried out at fair value, and the club may be forced to remove some of that sponsorship money for the purposes of the break-even provision.[373] For example, Paris Saint-Germain is owned by Qatar Sports Investments.[374] In 2012, Paris Saint-Germain secured a sponsorship agreement that guarantees

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367 Gard Lid Aabakken, *Financial Fair Play Explained—and the Implications for Bundesliga Clubs*, BUNDESLIGAFANATIC.COM (Oct. 9, 2012), http://bundesligafanatic.com/financial-fair-play-the-implications-for-the-teams-in-the-bundesliga/; *The Core Functions of the DFL*, BUNDESLIGA, http://www.bundesliga.com/en/about/our-task/ (last visited Nov. 11, 2014).

368 HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT COMMITTEE, FOOTBALL GOVERNANCE, REPORT, 2010-12, HC 792-1, 56 (U.K.).

369 Ben Chu, *Real Madrid v Borussia Dortmund: Europe's Balance of Power Tipping Towards a German Bundesliga That's Expert in Balancing Books*, THE INDEP. (Apr. 30, 2013), http://www.independent.co.uk/sport/football/European/real-madrid-v-borussia-dortmund-europes-balance-of-power-tipping-towards-a-german-bundesliga-thats-expert-in-balancing-books-8595644.html.

370 FFP Regulations, *supra* note 46, at 83.

371 Aabakken, *supra* note 367; *German Bundesliga Clubs Earn $173M From Shirt Sponsorship Deals*, SPORTSBUSINESS GLOBAL (July 26, 2012), http://www.sportsbusinessdaily.com/Global/Issues/2012/07/26/Marketing-and-Sponsorship/Shirt-Sponsor.aspx.

372 FFP Regulations, *supra* note 46, at 83.

373 *UEFA's FFP Regulations—Play To Win*, SWISSRAMBLE (Sept. 5, 2012), http://swissramble.blogspot.com/2012/09/uefas-ffp-regulations-play-to-win.html; Kok Chee Kheong, *The UEFA Financial Fair Play Regulations*, SKRINE, http://www.skrine.com/the-uefa-financial-fair-play-regulations (last visited Nov. 11, 2014); Gabriele Marcotti, *Euopean Soccer Goes Federal*, WALL ST. J. (Oct. 10, 2010), http://online.wsj.com/news/articles/SB10001424052748703358504575544030227545858.

374 John Sinnott, *Qatari Takeover Heralds New Dawn for Paris Saint-Germain*, BBCSPORT (Aug. 3, 2011, 10:10 PM), http://www.bbc.com/sport/0/football/14393012.

the club €150-200 million a year.[375] UEFA found that this agreement is improper under FFP, since the agreement is worth more than its market value, the excess amount from the sponsorship agreement.[376] UEFA valued the deal at only €100 million and will count that sum towards the club's accounts.[377] Paris Saint-Germain failed Financial Fair Play rules in 2014, due to this sponsorship deal.[378]

To make FFP more proportionate to its objective, it may be better and legal for UEFA to have a mandatory review of the financial data of each club every year similar to the German model, before giving clubs the license required to compete in the European club competitions. Instead of FFP explicitly rejecting owners' contributions of their own money to their clubs, FFP should be ensuring that the books even out, without regard to the origin of the money. If an owner intends to contribute to their club, it should be required that they make a solid commitment that will display in the club's financial records, which UEFA will inspect when granting licenses. The fair value provision should be eliminated. Owners should be able to contribute financially through excess sponsorships through their other companies, because it will appear on the books and demonstrate the amount of external investment that can be attributed to the owners.

2. *France's Financial Regulations*

This Comment will now explore the financial regulations in the French league. The financial governance of Ligue 1, France's top tier league, is directed by the Direction Nationale du Controle de Gestion (DNCG) which oversees every club's finances and has the power to sanction clubs if they do not protect the financial sustainability of that club.[379] This regulatory body controls the legal and financial situation of the clubs.[380] The most common

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375 Marco Bellinazzo, *Commercial Revenues: Premier League and Bundesliga Eclipse Serie A Clubs*, SERIE ADDICTED (May 1, 2014), http://www.serieaddicted.com/article/commercial-revenues_premier-league-and-bundesliga-eclipse-serie-a-clubs.php.

376 Richard Conway, *Paris Saint-Germain's £167m Deal Fails UEFA Financial Fair Play Rules*, BBCSPORT (Aug. 3, 2011, 5:34 PM), http://www.bbc.com/sport/0/football/27243933.

377 Mark Robben, *Reports: UEFA to Devalue PSG deal*, ESPNFC (Apr. 30, 2014), http://www.espnfc.com/uefa-champions-league/story/1802680/reports-uefa-halves-value-of-paris-saint-germain-sponsorship-deal-with-qatar-tourism-authority.

378 *Id.*

379 Andrew Wenger, *UEFA Financial Fair Play*, SOCCER POL./THE POL. OF FOOTBALL (Dec. 27, 2012), http://sites.duke.edu/wcwp/2012/12/27/uefa-financial-fair-play/.

380 Direction Nationale du Controle de Geston, Annexea la Convention FFF/LFP (2009-2010), Annex 1, *available at* http://www.lfp.fr/dncg/Reglements_DNCG_Annexe_FFF_LFP.pdf.

penalty is requiring clubs to establish a budget for hiring or imposing limits on the payroll of the clubs.[381] The purpose of this is to educate the club on how to remain financially stable.[382] 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.[383] Again, there is no fair value provision.[384]

The French version of FFP is much more proportionate than UEFA's FFP regulations. UEFA's FFP regulations, which include the fair value provisions, are not the least restrictive means of reaching FFP-stated objectives of introducing more discipline and rationality in club football finances and providing for long-term financial viability of football. DNCG has the right idea to look at how much a club owes each year.

3. *Less Restrictive Ways to Regulate Clubs Finances*

Looking at the yearly debt of each club is less restrictive and achieves the FPP's objective of regulating club finances. Both DNCG and the German Football Association consider clubs' yearly and overall debt levels. It might be preferable for UEFA to examine the amount by which each club's debt rises each year, or the amount of debt a club has compared to its annual revenue. If the debt rises above a certain percentage or a certain amount, then UEFA should bring sanctions. The sanctions should be similar to the sanctions DNCG has in place, requiring clubs to establish a budget for hiring or imposing limits on the payroll of the clubs. If a club is banned from European club competitions, their financial situation is likely to worsen, not improve, due to the loss of ticket revenue, prize money, and broadcasting revenue. UEFA could also require the club to make a realistic plan how to reduce debt, and the UEFA should only ban the club from European competitions if the club does not do so in a given amount of time.

As an alternative to FFP, UEFA should explore other options to introduce more discipline and rationality in club football finances, rather than granting a

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381 Karl Lusbec, *The UEFA Financial Fair Play; An Inspiration from the French DNCG?*, KARL'S FOOTBALL LOUNGE: THE FOOTBALL MARKETING BLOG (Feb. 2, 2011), http://karllusbec.wordpress.com/2011/02/02/the-uefa-financial-fair-play-a-inspiration-from-the-french-dncg/.

382 *Id.*

383 Direction Nationale du Controle de Geston, Annexea la Convention FFF/LFP, *supra* note 380.

384 *See* Alexandre Schmid, *Le Fair-Play Financier prêt à Bouleverser l'Europe?*, GOAL.COM (July 19, 2013), http://www.goal.com/fr/news/196/europe/2013/07/19/4129237/le-fair-play-financier-prêt-à-bouleverser-leurope.

license based on financial accounts. UEFA could consider at a standardized salary cap at the same rate for each club, which would equalize the playing field for the teams. Eliminating the break-even provision eliminates the anti-competition issue, since the main issue with this provision is that different clubs are limited to spending different amounts of money. However, clubs may not approve this proposal. Traditionally European football has never had a hard restraint on how much a team could spend, and a hard salary cap restricting all the clubs to spending the same amount of money might be too much of a radical change.[385] Instead, UEFA could place a cap on transfer fees[386] or a ceiling on the amount of income can be spent on wages.[387] A transfer cap 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.

UEFA could also combat excess spending by implementing a luxury tax.[388] If a club exceeds a given threshold, the club would be required to pay the league a Euro-to-Euro amount, which would be re-distributed to other teams to help create a competitive balance.[389] Or alternatively, similar to the NBA luxury tax,[390] UEFA could implement a sliding scale with a higher charge than the Euro-to-Euro amount after every €5 or 10 million. However, the luxury cap presents the issue of determining to whom UEFA would give the money, whether that be only clubs in European football or to all the top league clubs in UEFA. Potentially, UEFA could require each league to have a luxury tax, so the football associations will receive any luxury tax from clubs in that domestic league and can distribute the tax equally among all clubs in the top tier in the domestic leagues. This would avoid the issue of anti-competitive action associated with only distributing the money to clubs in European football.

Another alternative to FFP could be a shared revenue scheme, such that smaller clubs would not risk as much to reach the next level of football

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385 *See* Steve Tounge, *Clubs in Wage-Restraint Talks*, THE INDEP. (Oct. 14, 2012), http://www.independent.co.uk/sport/football/news-and-comment/clubs-in-new-wagerestraint-talks-8210351.html.

386 Ouriel Daskal, *Financial Fair Play Fail*, SOCCERISSUE.COM (May 24, 2012), http://www.soccerissue.com/2012/05/24/financial-fair-fail/.

387 Tounge, *supra* note 385.

388 Ouriel Daskal, *UEFA Should Seriously Consider an Alternative to FFP*, SOCCERISSUE.COM (Mar. 29, 2013), http://www.soccerissue.com/2013/03/29/uefa-should-seriously-consider-an-alternative-to-ffp/.

389 *Id.*

390 Moke Hamilton, *How NBA's Luxury Tax Penalties Will Impact Elite Teams*, BLEACHER REP. (Dec. 26, 2012), http://bleacherreport.com/articles/1457745-how-nbas-luxury-tax-penalties-will-impact-elite-teams.

competitions. Clubs would likely balk at the notion of an expectation to share merchandising or sponsorship revenues with other clubs, as sharing revenue in football is a revolutionary idea in European football. Instead, the broadcasting revenues from European football could be shared among all clubs in the national association, not only those competing in European football. Broadcasting has a significant impact on club revenues, especially in smaller leagues like Portugal.[391] If the national football association splits the broadcasting revenue equally between all the teams, there will be greater competitive balance and less incentive to go into debt to reach European football.

Ticket revenue sharing is another way to share revenue. This is not a revolutionary concept, as it occurs in the FA Cup.[392] Clubs will be unlikely to agree to share all ticket revenue, but an amount around 15% of the ticket revenues for European football to be divided among all the clubs in that national football association may be acceptable. Sharing some of the ticket revenue will decrease the incentive to go into debt to reach European football and will promote the long-term viability of European club football.[393] From these examples it is clear that there are many other less restricting ways than the break-even provision, which is not the most proportionate or less restrictive way to achieve FFP's objectives.

Additionally, FFP may be working against its own objectives with the break-even provision. FFP may cause clubs whose owners are wealthy enough to contribute their own money to be on shakier financial ground, since owners are no longer permitted to inject their money into their clubs to remedy any financial shortcomings. Clubs are searching for ways around this obstacle, but their success in avoiding sanctions is yet to be determined.[394] For example, as discussed earlier, Paris Saint-Germain is clearly able to get the money it needs to stay on financially stable ground, but would be in violation of UEFA's FFP

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[391] Even in smaller leagues the amount of money received from European football will make a large difference under the break-even provision. For example, when looking at the top Italian League, Seria A, AC Milan made €140.9 million in broadcasting in the 2012-2013 season, while AS Roma made only €66 million. This huge difference is due to the fact that AC Milan competed in the Champions League, while AS Roma did not compete in European football. This is a significant advantage, especially when considering AS Roma received 53% of its total revenue from broadcasting. A return to European competitions will be essential for significant growth in AS Roma in the future. *See* ALL TO PLAY FOR, *supra* note 164, at 9, 34.

[392] THE FOOTBALL ASS'N, THE FINANCIAL IMPACT OF THE FA CUP 7 (Jan. 2012).

[393] *See supra* Part I.C.

[394] *See* Marcotti, *supra* note 373.

rules. Instead, Paris Saint-Germain has a sham sponsorship deal worth €150–200 million a year that gives no shirt sponsorship or stadium naming rights.[395]

Under *Wouters* and *Meca-Medina*, anti-competitive restrictions are permitted if they are the least restrictive and most proportionate means by which to achieve a justified objective. These alternatives to FFP are less restrictive and more proportionate to achieve FFP's objective of repairing the broken football economic market. UEFA should explore these options, and replace the overly restrictive FFP with one of the alternatives.

CONCLUSION

Financial Fair Play is illegal under European Union competition law. When the Court decides the Striani challenge, the outcome should be that FFP is illegal under EU competition law. FFP can be challenged under either Article 101(1), or Article 102. However, the legal challenge is much more likely to succeed under Article 101(1). Only if the legal challenge using Article 101(1) should fail should there be a legal challenge under Article 102.

The legal challenge is more likely to succeed under Article 101(1). Under Article 101(1), FFP is affecting competition by creating divisions between national markets.[396] Additionally, under Article 101, FFP has clear actual effect of restricting or distorting the competition.[397] FFP will lower players' wages, reduce the number of transfers and their monetary worth, and forbid smaller clubs or leagues from competing with larger ones.[398] FFP will have an anti-competitive effect on the European club football market. Any defense UEFA may raise will fail, because FFP does not fit any of the criteria required and FFP's anti-competitive effect is not proportionate to its objective.

An article 102 argument should be raised only if the Article 101 argument fails, which is very unlikely. Under Article 102, FFP excludes smaller clubs and leagues within the European football market, and excludes smaller clubs within the domestic clubs markets from the possibility of improving.[399]

[395] Ouriel Daskal, *Deloitte's Money League: Yet Another Proof the FFP is a Joke*, SOCCERISSUE.COM (Jan. 23, 2014), http://www.soccerissue.com/2014/01/23/deloittes-money-league-yet-another-proof-the-ffp-is-a-joke/; *PSG New £570m Deal Stretches Credibility, Says UEFA FFP Expert,* CITYAM.COM (Dec. 12, 2012), http://www.cityam.com/article/psg-new-570m-deal-stretches-credibility-says-uefa-ffp-expert.

[396] *Supra* Part III.C.i.

[397] *Supra* Part III.C.ii.

[398] *Id.*

[399] *Supra* Part IV.

There are plenty less restrictive alternatives to the FPP regulations that will introduce financial responsibility and protect the long-term viability of the business of football. UEFA should look to alternative regulations to achieve these objectives. Instituting a luxury cap, keeping track of clubs' debt level, or revenue sharing would be preferable alternatives to achieve UEFA's goals.[400]

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[400] *See supra* Part V.

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