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Kicking the Penalty-Why the European Court of Justice should Allow Salary CAPS in UEFA

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NOTES

KICKING THE PENALTY: WHY THE EUROPEAN COURT OF JUSTICE SHOULD ALLOW SALARY CAPS IN UEFA

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INTRODUCTION

> The president of my former club . . . said I left because I got more money in England, that I didn't care about the shirt. I said: "Is there one player in the world who signs for a club and says, Oh, I love your shirt?" . . . He doesn't care. The first thing that you speak about is the money.[1]

Assou-Ekotto's statement sums up the familiar maxim, money talks. In many contexts, society is largely at ease with this truism. However, there are certain drawbacks to this condition, particularly in the world of sports.[2] Research shows that fans value uncertainty in results, and may lose interest in a sport if one team is too dominant, thus creating predictable outcomes.[3] Teams with less money find it difficult to compete with teams that have relatively more money to spend on the services of top-

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1. David Hytner, *Benoît Assou-Ekotto: 'I Play for the Money. Football's not my Passion'*, GUARDIAN (U.K.), Apr. 30, 2010, at 8, *available at* http://www.guardian.co.uk/football/2010/may/01/benoit-assou-ekotto-tottenham-hotspur.

2. *See* Frederick Wiseman & Sangit Chatterjee, *Team Payroll and Team Performance in Major League Baseball: 1985–2002*, 1 ECON. BULL. 1, 3 (2003) (asserting that there is a strong relationship between team performance and the average salary that the team pays to its players); *see also* Roger Bennett, *A Precarious Premier League?*, ESPN (July 19, 2012), http://www.espn.go.com/sports/soccer/story/_/id/8181527 (noting Guardian soccer writer David Conn's belief that clubs today win because of money being spent on teams, rather than coaching and local players).

3. *See* Daniel A. Rascher & John Paul G. Solmes, *Do Fans Want Close Contests? A Test of the Uncertainty of Outcome Hypothesis in the National Basketball Association*, 2 INT'L J. SPORT FIN. 130, 137–38 (2007) (explaining that fans want games in which the outcome is uncertain); *see also* Stefan Szymanski, *Income Inequality, Competitive Balance and the Attractiveness of Team Sports: Some Evidence and a Natural Experiment from English Soccer*, 111 ECON. J. F69, F69 (2001) ("It is widely accepted that a degree of competitive balance is an essential feature of attractive team sports.").

level athletes.[4] This problem is particularly critical in the Union of European Football Associations ("UEFA") Champions League because of the way the league is structured.[5] Twenty-eight of the thirty-two teams that have either won or been runner-up of the Champions League between 1997 and 2012 are among the twenty most valuable soccer teams in the world.[6]

In the United States, most popular professional sports have dealt with this issue by implementing salary caps: a maximum amount of money that can be spent on player salaries.[7] Salary caps have a positive effect on competitive balance, and provide leagues with financial stability.[8] In Europe, however, salary caps

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4. *See, e.g.*, Scott Butler, *New York Yankees . . . Just Buying Another Championship*, BASEBALLREFLECTIONS.COM (June 22, 2010), http://www.baseballreflections.com/2010/06/22/new-york-yankees-just-buying-another-championship (lamenting the New York Yankees' ability to outbid all other teams for players due to their massive financial advantage); Joe Posnanski, *World Series Lament for Indian Fans: What Might Have Been*, SPORTS ILLUSTRATED (Oct. 28, 2009), http://www.si.cnn.com/2009/writers/joe_posnanski/10/28/lee.sabathia/index.html (opining that the Cleveland Indians could not keep top level talent due to salary pressure from wealthier teams).

5. *See generally Competition Format*, UEFA, http://www.uefa.com/uefachampionsleague/season=2012/competitionformat/index.html (last visited Apr. 26, 2012) (explaining that the Champions League is comprised of the thirty-two European club teams, which are determined by applying a specific formula); *UEFA Member Associations*, UEFA, http://www.uefa.com/memberassociations/index.html (last visited Apr. 26, 2012) (listing the fifty-three European member associations of the Union of European Football Associations ("UEFA"), including the Champions League).

6. *Compare Soccer Team Values: Business on the Pitch*, FORBES, http://www.forbes.com/soccer-valuations/list (last visited Apr. 26, 2012) (listing the twenty most expensive soccer teams in the world and their current values), *with Football's Premier Club Competition*, UEFA, http://www.uefa.com/uefachampionsleague/history/index.html (last visited Apr. 26, 2012) (indicating each runner-up under "Winners" heading).

7. *See* Thomas M. Schiera, Note, *Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance That it Helped Destroy?*, 32 BROOK. J. INT'L L. 709, 722 (2007) ("All four major professional sports leagues in the United States have some form of salary cap . . . ."); *see also* Paul D. Staudohar, *Salary Caps in Professional Team Sports*, 3 COMP. WORKING CONDITIONS 3, 4 (1998) (characterizing salary caps as a quid pro quo to free agency, and giving a brief description of salary caps in each of the major American professional sports).

8. *See* Christine Snyder, Note, *Perfect Pitch: How U.S. Sports Financing and Recruiting Models Can Restore Harmony Between FIFA and the EU*, 42 CASE W. RES. J. INT'L L. 499, 519 (2009) (suggesting that salary caps can restore competitive balance in sports); *see also* Richard Alm, *A Salary Cap of Some Sort is in Baseball's Future*, DALLAS MORNING NEWS, Aug. 24, 2002, at 1F (positing that salary caps promote the financial stability of sports leagues).

have not yet been tested in a meaningful way.[9] In 2010, UEFA approved a salary cap that went into effect in 2012, and will be reviewed during the 2013–14 season.[10] In the absence of a salary cap, UEFA teams will continue to pay higher salaries than they can sustain over the long term, which will ultimately lead them to financial ruin.[11]

Part I of this Note details the background of antitrust law in the United States, competition law in the European Union, and their application to sports. In particular, it examines salary cap schemes. Part II discusses the issues regarding the legality of salary caps under both US antitrust law and EU competition law. Part III proposes the course of action that the European Commission should follow in its inevitable confrontation with the salary cap structure recently implemented by UEFA.

I. *KNOWING YOUR COMPETITION: ANTITRUST BACKGROUND IN THE UNITED STATES AND THE EUROPEAN UNION*

Part I lays out the background of antitrust law in the United States, as well as its European counterpart, competition law. Part I.A discusses the Sherman Antitrust Act and its application to sports. Part I.B addresses the different approaches US courts use to analyze antitrust cases. Part I.C explores European Union competition law and its application to sports. Finally, Parts I.D and I.E detail the history of salary caps in the United States and

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9. *See* Johan Lindholm, *The Problem With Salary Caps Under European Union Law: The Case Against Financial Fair Play*, 12 TEX. REV. ENT. & SPORTS L. 189, 190 (2011) (noting that salary caps are uncommon in European sports); *see also* Chris Deubert, *Putting Shoulder Pads on Schleck: How the Business of Professional Cycling Could Be Improved Through a More American Structure*, 37 BROOK. J. INT'L L. 65, 108 (noting that in 2011, UEFA would become the first European sports league to unilaterally implement a salary cap).

10. *See Financial Fair Play Regulations Are Approved*, UEFA (May 27, 2010), http://www.uefa.com/uefa/aboutuefa/organisation/executivecommittee/news/newsid=1493078.html (reporting the passage of a salary cap provision in UEFA) [hereinafter *FFP Regulations Approved*]; *see also* Natalie L. St. Cyr Clarke, *The Beauty and the Beast: Taming the Ugly Side of the People's Game*, 17 COLUM. J. EUR. L. 601, 622 (2011) (noting that the regulations come into effect in 2012).

11. *See Financial Fair Play Explained*, UEFA (June 2, 2010), http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay/news/newsid=1494481.html (noting the heavy aggregate losses of Europe's top teams) [hereinafter *FFP Explained*]; *see also* Jason Clout, *Field of Dreams*, AUSTL. FIN. REV., Aug. 5, 2011, at 35 (pointing out the heavy financial losses incurred by many European football clubs).

the European Union, respectively. Part I.D focuses on professional basketball and football in the United States. Major League Baseball ("MLB") and the National Hockey League ("NHL") are not included because MLB was granted an idiosyncratic exemption from antitrust law, and the NHL has a much more recent history of salary caps.[12]

A. *Antitrust Law in the United States*

1. The Sherman Antitrust Act

In the United States, the Sherman Antitrust Act provides the foundation of antitrust law. Passed in 1890, the law makes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . illegal."[13] Although the literal text suggests a broad application, Congress intended that Section 1 of the Act only prohibit unreasonable restraints of trade.[14] Thus, the elements of an antitrust violation are: "(1) a combination or conspiracy formed by two or more entities; (2) an unreasonable restraint of trade or commerce by the combination or conspiracy; (3) the interstate nature of the restrained trade or commerce; and (4) general intent."[15]

To determine whether there has been a violation of Section 1 of the Sherman Act, courts apply one of two different analyses: either the per se standard or the rule of reason standard.[16] The

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12. *See* Flood v. Kuhn, 407 U.S. 258, 282–83 (1972) (holding that baseball was to remain exempt from antitrust law, while other sports were not); Rick Westhead, *N.H.L. Players Overwhelmingly Approve Labor Deal*, N.Y. TIMES, July 22, 2005, at D1 (dating the earliest National Hockey League ("NHL") salary cap to 2005).

13. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

14. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("Since the earliest decisions of this Court interpreting this provision, we have recognized that it was intended to prohibit only unreasonable restraints of trade."); *see also* Christopher M. Brown & Nikhil S. Singhvi, *Antitrust Violations*, 35 AM. CRIM. L. REV. 467, 468 (1998) (citing the Supreme Court's holding that only unreasonable restraints of trade are prohibited).

15. Brown & Singhvi, *supra* note 14, at 469 (describing the elements the government must show to prove a criminal violation of the Sherman Act); *see* Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

16. *See* Brown & Singhvi, *supra* note 14, at 470–72 (identifying the two analytical approaches); Shawn Treadwell, *An Examination of the Nonstatutory Labor Exemption From the Antitrust Laws, in the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955, 963

practices normally associated with the creation and operation of professional sports leagues are not subject to per se analysis.[17] Per se analysis is applied when a restriction is so anti-competitive that further analysis is unnecessary.[18] Professional sports are, however, subject to the rule of reason standard.[19] Under this standard, courts look at the anti-competitive effects of the activity in question to determine whether the restraint is unreasonable.[20]

2. Exemptions for Sports from the Sherman Act

The US Supreme Court's perspective on the application of the Sherman Act to sports has evolved over the last century. Initially, the Court ruled that Section 1 of the Act did not apply to professional sports, holding that sports did not affect interstate commerce, and were therefore a purely local issue.[21] This decision, however, was made in 1922 when professional football and basketball were still in their infancy, and baseball was the only one of today's four major professional sports in the

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(1996) (noting that certain types of agreements are per se illegal, while others, like labor agreements in sports, are analyzed under the rule of reason approach).

17. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984) ("[T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."); Robert E. Freitas, *Overview: Looking Ahead at Sports and the Antitrust Law*, 14 ANTITRUST 15, 17 (2000) (documenting courts' recognition that without such restraints, the product could not exist at all).

18. *See NCAA*, 468 U.S. at 103–04 (denoting when per se analysis should be used); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (applying per se analysis where a restraint "lack[s] . . . any redeeming virtue") (internal quotations omitted).

19. *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1018–19 (1998) (applying rule of reason analysis to a sports-related antitrust case); M&H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 980 (1984) (refusing to employ per se analysis because the rule was "promulgated in a sports self-regulation context").

20. *See* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("[U]nder [the] 'rule of reason,' . . . the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition . . . ."); *see also* Brown & Singhvi, *supra* note 14, at 472 (describing how courts apply rule of reason analysis).

21. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro Base Ball Clubs, 259 U.S. 200, 208–09 (1922) (finding that baseball games, even when played by teams from different states, were still intrastate in nature); Michael J. Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489, § 2(a) (1974) ("Initially, federal courts held the view that professional sports were not engaged in interstate commerce, and that the federal antitrust laws were therefore inapplicable to them.").

United States that enjoyed any real popularity.[22] Over time, however, baseball and other professional sports leagues developed into booming interstate industries, prompting the Supreme Court to revisit its 1922 decision.[23] In 1972, the Court decided that, although baseball would remain exempt from the Sherman Act, "[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt."[24]

This decision did not, however, deliver a knockout blow to professional sports leagues, as they could still be exempted from antitrust law.[25] Two ways in which professional sports leagues may be removed from the scope of the Sherman Act are through the statutory and non-statutory exemptions from Sherman Act liability.[26] The statutory exemption, found in the 1914 Antitrust Act, says that antitrust laws are not to be "construed to forbid the existence and operation of labor . . .

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22. *See Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208 (holding that baseball is an intrastate activity not subject to antitrust law); *Chronology of Professional Football*, NFL.COM, http://static.nfl.com/static/content/public/image/history/pdfs/History/Chronology_2011.pdf (last visited July 26, 2012) (noting that it was not until 1920 that an organizational meeting for a professional football league was first held); *History of Basketball*, THE PEOPLE HISTORY, http://thepeoplehistory.com/basketballhistory.html (last visited July 26, 2012) (describing the early years of collegiate basketball in the early 1900s and early professional leagues in the 1930s). The four major American professional sports are basketball, baseball, football, and hockey. *See* Timothy G. Nelson, *Flag on the Play: The Ineffectiveness of Athlete—Agent Laws and Regulations—and How North Carolina Can Take Advantage of a Scandal to Be a Model for Reform*, 90 N.C. L. REV. 800, 817 (2012) (listing the four major professional sports in the United States).

23. *See* Flood v. Kuhn, 407 U.S. 258, 282–83 (holding that although baseball would remain exempt from the Sherman Act, other sports would not).

24. *Id.* at 282–83 (removing baseball from the purview of antitrust law, while still applying antitrust law to all other sports). Most scholars believe that baseball's anomalous exemption is illogical and against the prevailing law. *See* Nathaniel Grow, *In Defense of Baseball's Antitrust Exemption*, 49 AM. BUS. L.J. 211, 212–13 (2012) (acknowledging the general agreement among scholars regarding baseball's exemption from antitrust law).

25. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 235–36 (1996) (defining the non-statutory labor exemption as an exemption from antitrust law); Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (establishing that there is a statutory labor exemption from antitrust law which "allows unions to accomplish some restraints").

26. Sherman Antitrust Act, 15 U.S.C. § 17 (1914) (removing labor organizations from antitrust law); *Connell Const. Co.*, 421 U.S. at 622 ("[A] proper accommodation between the congressional policy favoring collective bargaining . . . and the congressional policy favoring free competition . . . requires that some union-employer agreements be accorded a limited non-statutory exemption from antitrust sanctions.").

organizations, . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."[27] The non-statutory labor exemption flows from the Supreme Court's holding, in *Connell Construction Co., v. Plumbers & Steamfitters Local Union No. 100,* that to best achieve congressional policies in the field of labor law, "some union-employer agreements [must] be accorded a limited non-statutory exemption from antitrust sanctions."[28]

The Court's *Connell* ruling is particularly relevant to professional sports leagues in which players have joined labor unions, including the National Basketball Association ("NBA"), National Football League ("NFL"), and the NHL.[29] Over the years, courts have held a panoply of activities to be exempt from antitrust law under the statutory and non-statutory labor exemptions.[30] These included fixed salaries for developmental squad players in the NFL, age restrictions on the NFL draft, and equalization rules in the NHL.[31]

B. *Rules of the Game: Analyses Used by the Courts*

Part I.B addresses the different analyses US courts apply in antitrust cases. First, Part I.B.1 identifies and explains per se and quick look analyses in depth. Then, Part I.B.2 details the rule of reason analysis. Finally, Part I.B.3 considers how courts have

27. 15 U.S.C. § 17 (1914).

28. *Connell Const. Co.*, 421 U.S. at 622 (creating the non-statutory labor exemption in some cases); *see Brown*, 518 U.S. at 250 (holding that the National Football League's ("NFL") actions were protected by the non-statutory labor exemption).

29. *See generally What We Do*, NBPA.COM, http://nbpa.org/what-we-do (last visited July 26, 2012) (enumerating the ways in which the union represents the players in the National Basketball Association ("NBA")); NFL Mgmt. Council & Nat'l Football League Players Ass'n, 2006 Collective Bargaining Agreement Preamble, at ii ("[T]he National Football League Players Association . . . is recognized as the sole and exclusive bargaining representative of . . . players in the NFL . . . .").

30. *See Brown*, 518 U.S. at 250 (exempting fixed salaries for developmental squad players in the NFL); Clarett v. NFL, 369 F.3d 124, 139–40 (2d Cir. 2004) (holding that age limitations in the NFL draft were exempt from antitrust law under the non-statutory labor exemption).

31. *See Brown*, 518 U.S. at 250 (holding that the non-statutory labor exemption applied to fixed salaries for NFL development team players); *Clarett*, 369 F.3d at 139–40 (exempting age restrictions on the NFL draft); NHL v. NHL Players Ass'n, 789 F. Supp. 288, 289 (D. Minn. 1992) (holding that certain NHL rules were exempted from antitrust law under the non-statutory labor exemption).

applied rule of reason analysis using examples like fixed salaries and product licensing.

1. Per Se and Quick Look Analyses

If no exemptions apply, and the Sherman Act is triggered, courts will apply one of three standards of review: per se, rule of reason, or quick look analysis.[32] Deciding which standard of review to apply can be a complicated issue for courts.[33] The per se rule is rarely used by the courts, and "applies only in those cases where the business practice in question is one, which on its face, has 'no purpose except stifling of competition.'"[34] A few examples of activities that could trigger per se analysis are horizontal agreements to boycott competitors, to divide territories, and to fix prices.[35] Courts therefore generally decline to apply per se analysis in sports-related antitrust cases.[36]

Similar to the per se rule is quick look analysis. Under this standard, a court will find a violation of the Sherman Act when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question

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32. *See* Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (enumerating the three standards of analysis); Katherine Kaso-Howard, *American Needle, Inc. v. National Football League: Justice Stevens' Last Twinkling of an Eye*, 44 LOY. L.A. L. REV. 1163, 1169–71 (2011) (describing the three approaches to antitrust analysis).

33. *See* Timothy A. Cook, *Pharmaceutical Patent Litigation Settlements: Balancing Patent & Antitrust Policy Through Institutional Choice*, 17 MICH. TELECOMM. & TECH. L. REV. 417, 436 (2011) (pointing out the difficulty courts face when trying to decide which standard of review to use); *see also* Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CALIF. L. REV. 835, 891 (1987) (discussing the importance of determining which standard of review to apply).

34. Eichorn v. AT&T Corp., 248 F.3d 131, 143 (3d Cir. 2001) (quoting White Motor Co. v. U.S., 372 U.S. 253, 263 (1963)); *see* Kaso-Howard, *supra* note 32 at 1170–71 (characterizing courts as being hesitant to apply per se analysis in all but the most clear-cut cases).

35. *See* Kaso-Howard, *supra* note 32, at 1170 (listing examples of activities that would trigger per se analysis); *see* Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327, 1334–35 (2010) (giving examples of when a court may use per se analysis).

36. *See* Freitas, *supra* note 17, at 16 ("[I]t is now settled that the practices typically associated with the organization of professional sports leagues and other organizations such as the NCAA are not subject to the per se rule."); *see, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99–100 (1984) (holding that per se analysis was inappropriate in a sports-related case).

have an anticompetitive effect on customers and markets."[37] Such a finding is rebuttable if the defendant can demonstrate a plausible "pro-competitive" justification for the restraint.[38] If the court accepts the pro-competitive justification, it will review the case under full rule of reason analysis.[39] Otherwise, with no mitigating pro-competitive justifications, the restraint will be condemned as an antitrust violation.[40] Quick look analysis is applied in situations "where per se condemnation is inappropriate, but where 'no elaborate industry analysis is required to demonstrate the anticompetitive character' of an inherently suspect restraint."[41]

2. Rule of Reason Analysis

The rule of reason is the most commonly used standard.[42] The Supreme Court presumptively applies the rule of reason test, which requires plaintiffs to demonstrate the

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37. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999); *see NCAA*, 468 U.S. at 109 (holding that no market analysis is required to demonstrate anticompetitive nature of "a naked restriction on price or output").

38. *See* United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993) ("If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective."); *see also* James A. Keyte, *American Needle: A New Quick Look for Joint Ventures*, 25 ANTITRUST 48, 51 (2010) (describing generally the process which a quick look analysis follows). To be "pro-competitive", a restraint must benefit competition. *See* THE INTERNATIONAL HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW 42 (Albert A. Foer & Jonathan W. Cuneo eds., 2010) (defining the term "pro-competitive" justification").

39. *See* Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 832 (3d Cir. 2010) ("Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis."); *see also* Keyte, *supra* note 38, at 51 (noting that if the court accepts the pro-competitive justification, it will then review the case under rule of reason analysis).

40. *See Brown Univ.*, 5 F.3d at 669 ("If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and 'the court condemns the practice without ado.'") (quoting Chi. Prof'l Spots Ltd. P'ship v. NBA, 95 F.3d 593, 674 (7th Cir. 1996); *see also* Keyte, *supra* note 38, at 51 (indicating that if the court rejects the pro-competitive justification, it will then condemn the restraint as a violation of antitrust law).

41. *Brown Univ.*, 5 F.3d at 669 (quoting NCAA, 468 U.S. at 109).

42. *See* Daniel Doda, *Antitrust Concerns in the B2B Marketplace: Are They "Bricks and Mortar" Solid or a "Virtual" Haze?*, 27 WM. MITCHELL L. REV. 1733, 1745 (2001) ("[T]he rule of reason is the standard most often used."); *see also* Matthew J. Jakobsze, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer After American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U. L. REV. 131, 138 (2010) (asserting that courts favor rule of reason analysis for sports leagues).

unreasonableness and anti-competitive nature of the restraint in question.[43] The rule of reason asks whether the restraints are unreasonable, and thus violate the Sherman Act.[44] In 1978, the Supreme Court synthesized the analysis to a question of whether "the challenged agreement is one that promotes competition or one that suppresses competition."[45] The defendant must then rebut the plaintiff's claim by demonstrating a pro-competitive objective.[46] For example, the defendant might argue that in the absence of the restriction, it would be impossible to sustain the line of business at all.[47]

As applied to sports-related antitrust cases, one popular justification has been the promotion of competitive balance within the league. For example, in *American Needle v. NFL*, the Supreme Court acknowledged the importance of competitive balance in professional football.[48] In subsequent rulings, courts

43. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) ("[T]his Court presumptively applies rule of reason analysis . . . ."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 726 (1988) ("[T]here is a presumption in favor of a rule-of-reason standard . . . .").

44. *See* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1062–63 (C.D. Cal. 1971) (noting that the Sherman Act applies only to *unreasonable* restraints of trade); *see also* John R. Gerba, Comment, *Instant Replay: A Review of the Case of Maurice Clarett, the Application of the Non-Statutory Labor Exemption, and its Protection of the NFL Draft Eligibility Rule*, 73 FORDHAM L. REV. 2383, 2384–85 (2005) (defining the rule of reason as prohibiting only unreasonable restraints on trade).

45. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).

46. *See Brown Univ.*, 5 F.3d at 669 ("If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective."); *see also* Kaso-Howard, *supra* note 32, at 1170 (explaining that if the plaintiff can show that the restraint suppresses competition, the defendant must then show that it is promoting a pro-competitive objective).

47. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984) (refusing to condemn a restriction by the NCAA because without it, televised football games could not exist); *see also* James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 530 (2011) (articulating an example of a pro-competitive justification).

48. Am. Needle, Inc. v. NFL, 130 S.Ct. 2201, 2217 (2010) ("We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'") (quoting *NCAA*, 468 U.S. at 117); *accord* Brady v. NFL, 644 F.3d 661, 664 (8th Cir. 2011) (noting that maintaining competitive balance is a legitimate purpose).

have extended the logic beyond professional football to include professional basketball.[49]

3. Putting the Rule of Reason in Play: Yazoo Smith, Practice Squad Players and Product Licensing

The rule of reason first entered into the arena of professional sports when former University of Oregon defensive back James "Yazoo" Smith sued the NFL in 1970.[50] Selected by the Washington Redskins in the first round of the 1968 draft, Smith played one unremarkable season before suffering a career-ending neck injury.[51] The Redskins paid him US$19,800, the amount he would have earned had he played out the remainder of his two-year contract.[52]

Two years later, Smith sued the NFL, arguing that the draft constituted a group boycott, which denied him his opportunity to negotiate a contract that reflected his open-market value.[53] The district court found that the draft was a per se violation of antitrust law, and awarded Smith more than a quarter million dollars in damages.[54] On appeal, the DC Circuit Court held that the draft was not a per se violation, as its intent was "not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive

49. *See* Chi. Prof'l Spots Ltd. P'ship v. NBA, 95 F.3d 593, 603–04 (7th Cir. 1996) (accepting that competitive balance is needed for the NBA to provide high-quality entertainment); Robertson v. NBA, 389 F. Supp. 867, 892 (S.D.N.Y. 1975) (acknowledging the need for competitive balance for the survival of professional sports leagues, including the NBA).

50. Smith v. Pro Football, Inc. (*Smith II*), 593 F.2d 1173, 1174, 1182 (D.C. Cir. 1978) (detailing the parties and their claims and noting the decision to apply rule of reason analysis to player restrictions).

51. *Smith II*, 593 F.2d at 1176 (summarizing Smith's short-lived NFL career); History of the NFL Draft, NFL.COM, http://www.nfl.com/draft/history/fulldraft?season=1968&round=round1 (last visited July 30, 2012) (summarizing the history of the NFL draft).

52. *Smith II*, 593 F.2d at 1176–77 (framing the particular facts of the underlying lawsuit).

53. Smith v. Pro Football, Inc. (*Smith I*), 420 F. Supp. 738, 741 (D.D.C. 1976) (arguing that "because of the draft . . . he was unable to negotiate a contract reflecting the free market or true value of his services").

54. *Id.* at 744 ("This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a per se violation of the antitrust laws.").

equality."[55] Having determined that the draft was not a per se violation, the court proceeded to analyze it under the rule of reason standard.[56] Under this standard, the court found that competitive balance was not a valid justification for such a restraint.[57] The *Smith* ruling stood for nearly two decades without challenge until DC Circuit Court Judge Wald's 1995 dissent in *Brown v. Pro Football* signaled the beginning of a shift in the judiciary's views on competitive balance.[58] In *Brown*, practice squad players sued the NFL over the League's unilateral imposition of a US$1,000 weekly salary.[59] The players claimed that the fixed salary violated the Sherman Act, accusing the NFL of price-fixing.[60] The circuit court held that the non-statutory exemption applied, but otherwise upheld the district court's decision.[61] As such, it declined to analyze the issue under the rule of reason.[62]

In her dissent, Judge Wald expressed the belief that the non-statutory exemption should not apply.[63] She proceeded to note that competitive balance on the field may have been a justifiable pro-competitive benefit.[64] The League had "colorably argued [ ] that the wage restraint imposed on rookie and first-year nonroster players was necessary to enhance on-field 'competitive balance' among teams, thereby making NFL

55. *Smith II*, 593 F.2d at 1179.

56. *See id.* at 1182 (recognizing that the court's relative unfamiliarity with the issues prevented it from declaring the restraint automatically illegal, and that rule of reason analysis was required instead).

57. *See id.* at 1186 ("[T]he NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost.").

58. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1059 n.3 (D.C. Cir. 1995) (Wald, J., dissenting) (expressing a belief that competitive balance might be relevant).

59. *See id.* at 1045 (summarizing the facts of the underlying case).

60. *Id.* at 1047 ("[P]layers . . . brought a class action lawsuit against all 28 NFL clubs and the NFL itself . . . alleging that the defendants engaged in price-fixing in violation of the Sherman Act. . . .").

61. *Id.* at 1045 ("[W]e hold that the District Court erred in rejecting the appellants' claim that the *nonstatutory labor exemption* shields them from liability in this case.").

62. *See id.* (refusing to address a number of challenges to the District Court's ruling because the non-statutory exemption was found to apply).

63. *See id.* at 1058 (Wald, J., dissenting).

64. *See id.* at 1059 n.3 (Wald, J., dissenting).

football a more attractive and economically competitive entertainment product."[65]

The issue of competitive balance in professional sports finally made it to the nation's highest court in the 2010 case *American Needle v. NFL*.[66] From 1963 to 2000, National Football League Properties ("NFLP") licensed multiple vendors to manufacture and sell team apparel, including a company called American Needle.[67] In 2000, the NFLP stopped granting non-exclusive licenses, and instead granted a single, ten-year exclusive license to Reebok International.[68] The license commissioned Reebok to manufacture and sell all headwear for all of the teams in the NFL and ended American Needle's license.[69] In response, American Needle filed an antitrust suit, alleging that this agreement violated the Sherman Act.[70]

Although the issue was a narrow one, the Supreme Court still contemplated competitive balance's role in sports antitrust analysis.[71] Just before the end of the opinion, the Court noted that competitive balance was a legitimate and important interest, which may survive rule of reason analysis.[72] Ultimately, however, it did not decide whether it would survive as a matter of law.[73] The general rule announced by the Court was that "[w]hen 'restraints on competition are essential if the product is to be

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65. *Id.*

66. *See* Am. Needle, Inc. v. Nat'l Football League, 130 S.Ct. 2201, 2217 (2010) (holding that competitive balance was a pro-competitive justification). The Supreme Court had addressed the issue of competitive balance once before, but only in amateur sports. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 85 (1984) (holding that competitive balance was not a pro-competitive justification).

67. *Am. Needle*, 130 S.Ct. at 2207 (describing the agreement between the National Football League Properties ("NFLP") and apparel vendors).

68. *Id.* (explaining that NFLP granted Reebok International Ltd. an exclusive ten-year license to manufacture and sell trademarked headwear for all thirty-two teams).

69. *Id.* (giving details about Reebok's agreement with the NFPL).

70. *Id.* (documenting American Needle's response to Reebok's exclusive license agreement with the NFPL).

71. *See id.* at 2208 ("[W]e have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a 'contract, combination . . . , or conspiracy' as defined by §1 of the Sherman Act . . . ."); *see also* McKeown, *supra* note 47, at 519 (observing that the Court had a narrow issue before it, but "devoted its penultimate paragraph to discuss competitive balance").

72. *See Am. Needle*, 130 S.Ct. at 2217 (recognizing competitive balance as a legitimate interest).

73. *Id.* ("What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.").

available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason."[74] The Court further noted that the restraint will usually survive such an analysis.[75] Furthermore, the Court expressed the view that full rule of reason analysis might not be necessary in all instances, and that an abridged version could be applied in similar cases.[76]

C. *Competition Law in the European Union*

1. The Treaty on the Functioning of Europe, Article 101

Similar to the United States, the European Union also prohibits anti-competitive restraints.[77] Article 101(1) of the Treaty on the Functioning of European Union ("TFEU") prohibits agreements that affect trade by restricting competition.[78] Only when a restraint prevents, restricts, or distorts competition to an appreciable extent does it violate Article 101(1).[79] The main inquiries are (1) whether there is an agreement between undertakings, (2) whether the object or effect of the restraint is the prevention, restriction or distortion of competition, and (3) whether it affects trade between member states.[80] An undertaking includes "every entity engaged

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74. *See id.* at 2216 (quoting NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984)).

75. *See id.* ("In such instances, the agreement is likely to survive the Rule of Reason.").

76. *See id.* at 2216–17 ("[D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it 'can sometimes be applied in the twinkling of an eye.'") (quoting *NCAA*, 468 U.S. at 109, n. 39).

77. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2008 O.J. C 115/47, at 88 [hereinafter TFEU]; *see also* Howard W. Fogt, Jr. & Ilene Knable Gotts, *The Antitrust and Technology Transfer Licensing Interface: A Comparative Interface of Current Developments*, 13 INT'L TAX & BUS. J. 1, 29 (1995–96) (noting the European Union's commitment to removing anti-competitive restraints).

78. *See* TFEU, *supra* note 77, 2008 O.J. C 115/47, at 88 (prohibiting agreements that restrict or distort trade between members of the European Union); *see also* Sean-Paul Brankin, *Introduction*, *in* INTRODUCTION TO EU COMPETITION LAW 1, 12 (Peter R. Willis ed., 2005) (explaining that Article 101 prohibits anti-competitive restraints).

79. *See* TFEU, *supra* note 77, art. 101, 2008 O.J. C 115/47, at 88–89 (listing the requirements for a violation of competition law); *see also* Brankin, *supra* note 78, at 12 ("For an agreement to infringe the Article [101(1)] prohibition it must [ ] prevent, restrict or distort competition; and [ ] do so to an appreciable extent.").

80. Ariel Ezrachi, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES 44–45 (2d ed. 2010) (dividing Article 101 into four main questions); *accord* Marc

in an economic activity, regardless of the legal status of the entity and the way in which it is financed . . . ."[81]

Analysis of the object or effect of a restraint is disjunctive.[82] If *either* the object *or* the effect of a restraint is the prevention, restriction, or distortion of competition, it is prohibited.[83] Finally, when determining the effect on trade between member states, courts look to reasonably foreseeable objective factors that may have "an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States."[84] The intent of such an analysis is to draw a boundary between areas covered by national law and areas covered by European Union law.[85]

TFEU Article 101(3) offers possible exemptions from competition law.[86] Article 101(3) grants exemptions from 101(1) in a few specific instances.[87] For example, a restraint may be exempt if it improves distributional, technical, or economic progress, and allows consumers a fair share of the resulting benefit.[88] These exemptions, however, only apply if the restraint exclusively affects areas that are indispensable to attaining the

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Firestone, *A Quick Look at Two Areas of Doctrinal Difference Between EU and U.S. Decision Makers*, 20 TUL. J. INT'L & COMP. L. 1, 22 (2011) (describing the four elements of a violation under Article 101).

81. Höfner v. Macrotron GmbH, Case C-41/90, [1991] E.C.R. I-1979, ¶ 21 (defining the term "undertaking").

82. *See* TFEU, *supra* note 77, art. 101(1), 2008 O.J. C 115/47, at 88 (prohibiting agreements, decisions, 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 . . . .") (emphasis added).

83. *See* Société Technique Minière v. Maschinenbau Ulm GmbH, Case 56/65, [1966] E.C.R. 235, 249 (noting that the requirements are alternative rather than cumulative).

84. *See id.* at 251; *see also* Lindholm, *supra* note 9, at 199 (quoting *Société Technique Minière*, [1966] E.C.R. 235 at 249).

85. *See* Consten S.A.R.L. & Grundig-Verkaufs-GmbH v. Commission, Joined Cases 56/64 & 58/64, [1966] E.C.R. 299, 341 (differentiating between national laws and those that apply to interactions between Member States).

86. *See* TFEU, *supra* note 77, art. 101(3), 2008 O.J. C 115/47, at 88–89 (offering exemptions from the prohibited activities under Article 101(1)); *see also* Ezrachi, *supra* note 80, at 49 (describing various exemptions from competition law).

87. *See* TFEU, *supra* note 77, art. 101(3), 2008 O.J. C 115/47, at 88–89 (exempting certain agreements, decisions, and practices that would otherwise be prohibited by Article 101(1)).

88. *See id.* (specifying requirements for exemption from Article 101(1) coverage).

stated goal and does not give the undertakings the opportunity to eliminate competition.[89] Under Article 101(3) analysis, the court will weigh advantages and disadvantages.[90]

Similarly, restrictions that are necessary for the implementation of a non-restrictive activity, and are also proportionate to the activity are exempted from competition law under the ancillary restraints exemption.[91] To be directly related, the restraint must be "subordinate to the implementation of that transaction and [ ] inseparably linked to it."[92] To determine the necessity of a restriction, a court must decide whether it is objectively necessary to implement the main transaction.[93] Unlike the Article 101(3) defense, the ancillary restraint defense does not permit judicial weighing of pro-competitive versus anti-competitive effects.[94]

The European Court of Justice ("ECJ") has established its own version of a non-statutory labor exemption similar to the one used in the United States. In the 2007 case *International Transportation Workers Federation v. Viking Line ABP*, Advocate General Poiares Maduro opined that collective agreements were immune from antitrust laws.[95] This opinion became particularly relevant to professional sports when, in 2007, UEFA and the Fédération Internationale des Associations Professionnels ("FIFPro") Division Europe signed a Memorandum of Understanding, in which UEFA recognized FIFPro Division

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89. *See id.* (noting further requirements for exemption from Article 101(1)).

90. *See* GlaxoSmithKline Servs. v. Comm'n, Case T-168/01, [2006] E.C.R. II-2969, ¶ 244 (granting the European Commission ("EC") discretion to weigh the advantages and disadvantages of a particular restraint).

91. Commission Communication on the Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. C 101/08 at 97, ¶ 29 [hereinafter TFEU Guidelines] (explaining the requirements of exemption under the ancillary restraints doctrine); Ezrachi, *supra* note 80, at 47 (exempting restrictions that are "directly related to and necessary for the implementation of a main non-restrictive transaction and [are] proportionate to it").

92. TFEU Guidelines, *supra* note 91, at 97, ¶ 101.

93. *Id.* (requiring the court to discern whether a restriction is necessary).

94. *Id.* (instructing the court against weighing pro-competitive effects against anti-competitive effects).

95. Opinion of Advocate General Maduro, Int'l Transp. Workers' Fed'n v. Viking Line ABP, Case C-438/05, [2007] E.C.R. I-10779, ¶ 27 (citing Opinion of Advocate General Jacobs, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, Case C-67/96, [1999] E.C.R. I-5751, ¶¶ 179, 183) ("[C]ollective agreements must enjoy a 'limited antitrust immunity.'").

Europe as "the only umbrella organisation of trade unions for professional association football players in Europe."[96] In the same agreement, FIFPro Division Europe recognized UEFA "as the European governing body for association football at all levels."[97] Through this formal mutual recognition, UEFA and FIFPro Division Europe closely resemble a typical US-style players' association, which would be granted limited antitrust immunity under *Viking Line* and its 1999 predecessor, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*.[98]

2. Application of Competition Law to Sports

As long as sports constitute economic activity, they are subject to competition law.[99] In 1993, the ECJ specifically declared that the activities of professional and semi-professional footballers comprised economic activity, thus subjecting them to competition law.[100] The ECJ proceeded to hold that even in cases where the restraint directly governed the sport, "the mere fact that a rule [was] purely sporting in nature [did] not have the effect of removing [it] from the scope of the [TFEU]."[101]

The ECJ's standard of review differs slightly from the US standard. Unlike the United States, where the rule of reason applies, and courts engage in a balancing test between pro- and anti-competitive effects, the ECJ claims that it does not employ a

96. *Players' Unions*, UEFA.COM, http://www.uefa.com/uefa/stakeholders/playersunions/index.html (last visited Sept. 23, 2012) [hereinafter *Players' Unions*].

97. *Id.*

98. *See* Opinion of Advocate General Maduro, *Int'l Transp. Workers' Fed'n*, [2007] E.C.R. I-10779, ¶ 27 (citing Opinion of Advocate General Jacobs, *Albany Int'l BV*, [1999] E.C.R. I-5751) (granting limited antitrust immunity to collective agreements); *see also Players' Unions*, *supra* note 96 (acknowledging that the Fédération Internationale des Footballeurs Professionnels ("FIFPro") represents soccer players).

99. Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman, Case 415/93, [1995] E.C.R. I-4921, ¶ 73 (holding that sports are only subject to Community law if they constitute economic activity); B.N.O. Walrave v. Association Union Cycliste Internationale, Case 36/74, [1974] E.C.R. 1405, 1417 (noting that sports are subject to Community law when they embody economic activity).

100. *Bosman*, [1995] E.C.R. I-4921, ¶ 73 ("This applies to the activities of professional or semi-professional footballers . . . .").

101. Meca-Medina v. Comm'n of the European Communities, Case C-519/04, [2006] E.C.R. I-6991, ¶ 27; Commission of the European Communities, The EU and Sport: White Paper from the Commission to the European Council, COM (2007) 391 Final, ¶ 2.1.1, (July 11, 2007) [hereinafter *White Paper*].

rule of reason when analyzing a restraint under Article 101(1).[102] Any balancing of competitive effects, the ECJ ruled, should be limited to analysis under Article 101(3).[103]

In practice, however, the analysis is not always carried out this way. In 2006, the ECJ took a significant step toward the US model. In *Meca-Medina v. Commission of the European Communities*, a case involving an anti-doping rule for Olympic swimmers, the ECJ engaged in balancing pro- and anti-competitive effects of the rule.[104] The rule in question, promulgated by the International Olympic Committee ("IOC"), prohibited the use of certain drugs.[105] A male athlete would be in violation of this policy if certain substances were found in his body in excess of a pre-established limit.[106] The athletes in this case, having been suspended from competition under the policy, argued that the two-nanogram limit was scientifically unfounded, and a suspension as a result would "lead[] to the infringement of the athletes' economic freedoms."[107] Ultimately the ECJ held that because the rule was necessary for the "proper conduct of competitive sport," the rule was justifiable, and thus exempt from competition law.[108]

In its *Meca-Medina* opinion, the ECJ borrowed logic from *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, a 2002 case in which the Court held that the overall context, as well as the objects and effects of the restraint in question, must be taken into account.[109] The *Wouters* Court also held that the

102. *See* Métropole Télévision v. Comm'n of the European Cmtys., Case T-112/99, [2001] E.C.R. II-2459, ¶ 74 (identifying the only situation in which any sort of pro- or anti-competitive balancing may take place); O2 GmbH v. Commission, Case T-328/03, [2006] E.C.R. II-1231, ¶ 69 (noting that no assessment of pro- or anti-competitive effects should take place); Kaso-Howard, *supra* note 32, at 1170 (describing the American version of rule of reason analysis).

103. *See O2 GmbH*, [2006] E.C.R. II-1231, ¶ 69 (holding that rule of reason has no place under Article 101(1)); *see also* Ezrachi, *supra* note 80, at 47 (arguing that Article 101(1) does not entail any 'rule of reason' analysis).

104. *See Meca-Medina*, [2006] E.C.R. I-6991, ¶ 29–30.

105. *Id.* ¶ 2 (acknowledging the IOC's anti–doping rule).

106. *Id.* ¶ 2 (explaining some of the details of the anti–doping rule).

107. *Id.* ¶ 3.

108. *Id.* ¶ 19–21 (exempting the anti-doping rule from competition law).

109. *Id.* ¶ 42 (citing to Wouters for the proposition that "account must . . . be taken of the overall context . . . and . . . its objectives"); Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, [2002] E.C.R. I-1577, ¶ 97

ECJ must determine whether the restrictive effects were inherent to the objectives, and if those effects were proportionate to the objectives.[110]

Under the *Meca-Medina* and *Wouters* analysis, a legitimate objective may justify an otherwise restrictive activity.[111] Examples of legitimate objectives include ensuring fair competition, protecting the health of the athletes, keeping spectators safe, ensuring financial stability of the sport, and maintaining consistent rules for the sport.[112] Also, akin to the United States, maintaining competitive balance between teams in a professional sports league, as well as maintaining uncertainty in outcomes of matches, are considered legitimate aims.[113]

D. *The History of Salary Caps in the United States*

The NBA was the first of the four major US sports leagues to institute a salary cap.[114] Shortly before and during the 1982–83 NBA season, then-Commissioner Lawrence O'Brien, National Basketball Players Association ("NBPA") counsel Lawrence Fleisher, and future-Commissioner David Stern, met to negotiate a player salary cap.[115] After difficult talks, the parties

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(holding that a court may assess the objects and effects of a restriction in determining whether it violates competition law).

110. *Wouters*, [2002] E.C.R. I-1577, ¶ 110 (holding that the court must decide whether the anti-competitive effects were inherent and proportionate to its pro-competitive objective).

111. *See id.*; *Meca-Medina*, [2006] E.C.R. I-6991, ¶ 45 (holding that the anti-doping rule was not a violation of competition law because it was justified by legitimate objectives).

112. *Bosman*, [1995] E.C.R. I-4921, ¶ 106 (including preserving uncertainty of results and recruiting young players as examples of a legitimate objectives); *White Paper*, *supra* note 101, at ¶ 2.1.5 (listing some examples of legitimate objectives for restrictions in sports).

113. *Bosman*, [1995] E.C.R. I-4921, ¶ 106 (holding that maintaining competitive balance is a legitimate objective); *see* Lehtonen v. Fédération Royale Belge des Sociétés de Basket-Ball ASBL, Case C-176/96,[2000] E.C.R. I-2681, ¶¶ 53–55 (recognizing the importance of competitive balance throughout a season).

114. *See* Staudohar, *supra* note 7, at 4 (detailing the history of the 1982 NBA Collective Bargaining Agreement ("CBA"), which established the first salary cap in professional sports); *see also* Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 276 (2008) (noting that the NBA was the first American professional sports league to have a salary cap).

115. *See* Staudohar, *supra* note 7, at 4 (describing the negotiations between the NBA and the NBPA); *see also* ROBERT C. BERRY ET AL., LABOR RELATIONS IN

reached an agreement on March 31, 1983 that limited teams to US$3.6 million in salaries, or fifty-three percent of gross revenues, whichever was higher.[116]

In 1998, the NBPA demanded the removal of salary caps.[117] This time, the owners locked out the players and threatened to cancel the season.[118] Ultimately, the season was salvaged when both sides agreed to keep salary caps in place.[119] In 2005, both sides agreed to make slight changes to the salary cap structure, leading to an amicable agreement on the new collective bargaining agreement ("CBA").[120]

Once again in 2011, the NBA and NBPA clashed over the CBA. Unable to reach an agreement, the NBA owners locked the players out on July 1.[121] After five months of hard-fought labor disputes, the sides finally agreed upon a new ten-year CBA on December 8, 2011.[122] Under the new agreement, the

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PROFESSIONAL SPORTS 181 (1986) (discussing the background of the 1982 NBA labor negotiations).

116. *See* Staudohar, *supra* note 7, at 4 (reporting that the reason the actual amount was higher than the one scheduled was that the actual amount reflected fifty-three percent of revenues, while the scheduled amount was merely the minimum cap); Andrew Zimbalist, *Perspective; Team Profits and Labor Peace*, N.Y. TIMES, July 5, 1998, at Sec. 8, p. 13 (describing the terms of the CBA).

117. Larry Coon, *NBA Salary Cap FAQ* (Aug. 5, 2012), http://www.cbafaq.com/salarycap.htm [hereinafter *NBA Salary CAP FAQ*]; Zimbalist, *supra* note 116, at § 8, p. 13 (observing the players' refusal to accept a salary cap).

118. *NBA Salary Cap FAQ*, *supra* note 117 (noting the lockout imposed by the NBA owners in 1998); *see* Zimbalist, *supra* note 116 (acknowledging the lockout in 1998).

119. *NBA Salary Cap FAQ*, *supra* note 117 (noting that the 1998 agreement created a salary cap); *accord* Laura Vecsey, *M's in Thick of Baseball's Financial Mess*, SEATTLE POST-INTELLIGENCER, May 18, 1999, at E1 (mentioning that the NBA lockout was ended with a salary cap).

120. *NBA Salary Cap FAQ*, *supra* note 117 (mentioning that the new NBA CBA was signed in July of 2005); *NBA's Collective Bargaining Agreement Finalized and Signed*, USA TODAY, July 30, 2005, *available at* http://www.usatoday.com/sports/basketball/nba/2005-07-30-cba-finalized_x.htm (reporting the completion of the NBA's new CBA).

121. *See* Howard Beck, *Stalemate in Labor Talks Forces N.B.A. to Shut Down*, N.Y. TIMES, July 1, 2011, at B9 ("After two years of static negotiations on a new labor deal, N.B.A. owners voted Thursday to impose a lockout. . . ."); *see also NBA Lockout Timeline*, NBA.COM (Sept. 9, 2011), http://www.nba.com/2011/news/09/09/labor-timeline/index.html (noting the date of the 2011 NBA lockout) [hereinafter *NBA Lockout Timeline*].

122. *See NBA Lockout Timeline*, *supra* note 121 (noting the date of the ratification of the new CBA); *see generally* Nathaniel Grow, *Decertifying Players' Unions: Lessons From the NFL and NBA Lockouts of 2011* (Univ. of Ga., Dep't of Ins., Legal Studies, Real Estate Working Paper Series) (describing the 2011 NBA lockout).

minimum percentage of the cap that teams must spend on players' salaries increased from the previous CBA.[123]

Salary caps were first incorporated by the NFL in the 1993 CBA between the league and the National Football League Players Association ("NFLPA").[124] The CBA, which took effect in 1994, guaranteed players a minimum salary of fifty-eight percent and a maximum of sixty-four percent of gross revenues.[125] Over the next few years, the maximum percentage varied slightly, ultimately ending up at sixty-two percent in 1997.[126] The 1993 CBA was extended to remain in effect through 2007, with the final year being uncapped as an incentive to finish the extension before the CBA expired.[127] In 2006, the final uncapped year of the CBA, CBA extension negotiations stalled over a revenue sharing issue.[128] On March 8, 2006, the NFL and NFLPA agreed to terms and extended the CBA for six more years.[129]

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123. *NBA Salary Cap FAQ*, *supra* note 117 (charting the increase in minimum payroll from year to year); Ira Winderman, *NBA CBA: Official NBA Agreement Document*, SUN SENTINEL (Nov. 27, 2011, 9:49 AM), http://blogs.sun-sentinel.com/sports_basketball_heat/2011/11/nba-cba-official-nba-agreement-document.html (giving details of the 2011 NBA CBA agreement).

124. *See* Staudohar, *supra* note 7, at 6 (documenting when the NFL first instituted a salary cap); *see also* Larry Weisman, *Tagliabue Likes to See Big Picture*, USA TODAY, Nov. 29, 1993, at 1C (noting that the new labor agreement included a salary cap).

125. *See* Staudohar, *supra* note 7, at 7 (laying out percentages NFL teams must pay their players); *see also* Rick Stroud, *Tampa Bay Buccaneers \ What's the Game Plan?*, ST. PETERSBURG TIMES, Nov. 28, 1993, at 1A (noting the amount of gross revenues NFL teams must spend on players under the new CBA).

126. *See* Staudohar, *supra* note 7, at 7 (tracking salary cap percentages from 1994 to 1997); *see also* Hal Bock, *Salary Cap Born in '82 With NBA*, CHARLOTTE OBSERVER, Aug. 21, 1994, at 4H (mentioning the changes in gross revenue percentages to be paid over the years).

127. *See* Ari Nissim, *The Trading Game: NFL Free Agency, the Salary Cap, and a Proposal for Greater Trading Flexibility*, 11 SPORTS LAW J. 257, 258, 262 (2004) (noting that the CBA had been extended through 2007, with 2006 as the final capped year); *see also Tagliabue Timeline*, USA TODAY, Mar. 21, 2006, at 3C (including January 7, 2002 extension of NFL CBA through 2007 in timeline of NFL Commissioner Tagliabue's career, as well as his avoidance of an uncapped year in 2007).

128. *See* David C. Weiss, *How Terrell Owens, Collective Bargaining, and Forfeiture Restrictions Created a Moral Hazard That Caused the NFL Crime Wave and What it Meant for Michael Vick*, 15 SPORTS LAW. J. 279, 298 (2008) (opining on the reason for the failure of CBA negotiations); *see also* Ed Bouchette, *Signing Ward No. 1 Priority*, PITT. POST-GAZETTE, Mar. 22, 2005, at D6 (predicting that solving the revenue sharing problem will be necessary to approve a new CBA).

129. *See* Jarrett Bell, *NFL Owners Preserve Labor Peace*, USA TODAY, Mar. 9, 2006, at 1C (reporting that players and owners agreed to extend the CBA); *see also* Mark Maske,

In spite of the recent agreement, the NFL opted out of the 2006 CBA in 2008.[130] Despite NFL Commissioner Roger Goodell and NFLPA Executive Director Gene Upshaw's initial optimism, the two sides were unable to reach an agreement by the March 11, 2011 deadline.[131] Ultimately, the NFLPA decertified, or ceased representing the players, and the players brought an antitrust suit against the League.[132] Both sides ratified a new ten-year CBA on August 4, 2011, settling the antitrust suit.[133] Part of the new CBA required teams to spend at least eighty-nine percent of the salary cap annually.[134] This requirement, however, will not take effect until 2013.[135]

Eagles' Deactivation of Owens Stands, WASHINGTON POST, Mar. 9, 2006 (observing that the 2006 CBA had been extended for six more years).

130. John Clayton, *NFL Owners Vote Unanimously to Opt out of Labor Deal*, ESPN.COM (May 20, 2008), http://sports.espn.go.com/nfl/news/story?id=3404596 (reporting that NFL owners had opted out of the 2006 CBA); Jarrett Bell, *Contentious Campaign, Critical Vote Much Is on the Line as NFLPA Gets Ready to Select Its New Leader*, USA TODAY, Mar. 11, 2009, at 1C (noting that NFL owners voted to opt out of the CBA in early May).

131. *See* Clayton, *supra* note 130 ("'We are not in dire straits. We've never said that. But the agreement isn't working, and we're looking to get a more fair and equitable deal' [said Goodell]", with Upshaw adding "'All this means is that we will have football now until 2010 and not until 2012,'"); *see also* Alex Marvez, *NFL Owners Lock Out Players*, FOX SPORTS (Mar. 12, 2011), http://msn.foxsports.com/nfl/story/NFL-Players-Association-union-decertifies-labor-talks-owners-031111 (detailing the inability of the NFL and the National Football League Players' Association ("NFLPA") to agree to terms).

132. *See* Brady v. Nat'l Football League, 779 F. Supp. 2d 992 (stating the factual background of a suit in which NFL players sued the league for an antitrust violation); *See* Marvez, *supra* note 131 ("Shortly after Friday's decertification, an antitrust lawsuit was filed against the NFL by nine current NFL players . . . .")

133. *NFL Players Ratify New CBA*, ESPN.COM (Aug. 5, 2011), http://espn.go.com/nfl/story/_/id/6834391/nfl-players-ratify-collective-bargaining-agreement-which-includes-hgh-testing-sources-say (reporting the players' ratification of a new CBA); *NFL Players Ratify Agreement—CBA Details Worked Out; League Plans HGH Tests*, MEMPHIS COM. APPEAL, Aug. 5, 2011, at D2 (detailing some aspects of the CBA ratified by NFL players).

134. *See* Mike Florio, *Per-Team Spending Minimum Doesn't Apply Until 2013*, NBC SPORTS (July 30, 2011), http://profootballtalk.nbcsports.com/2011/07/30/per-team-spending-minimum-doesnt-apply-until-2013 (reporting the minimum percentage of the salary cap teams must spend annually); *see also Could Rams, Jaguars Pull Off Double Move?*, ST. LOUIS BUS. JOURNAL, Dec. 1, 2011 [hereinafter *Double Move*] (acknowledging the minimum spending requirements of NFL teams starting in 2013).

135. Florio, *supra* note 134 (noting that this provision will not take place until 2013); *Double Move*, *supra* note 134 (noting that the minimums take effect in 2013).

E. *Salary Caps in the European Union*

Salary caps in the European Union are extremely rare, and thus far have only been implemented in a handful of sports leagues (typically rugby leagues).[136] As Europe's premier professional sports association, UEFA's recent attempt to implement a salary cap scheme will draw a great deal of scholarly attention in the coming years.[137] On May 27, 2010, UEFA's Executive Committee unanimously approved the Financial Fair Play Regulations ("FFP"), a set of new regulations intended to protect the financial viability of its member clubs.[138] Noting that clubs were sustaining high losses due to, at least in part, high player salaries, UEFA felt that there was an urgent need to "curb[] the excessive spending and inflated transfer fees and player salaries that have endangered football in recent years."[139] To achieve this goal, the FFP has a "break-even requirement," which says that a club will fail if its expenses exceed its income by more than EU€5 million over a three year period.[140]

II. *GETTING THE BALL IN PLAY: ARE SALARY CAPS PERMISSIBLE UNDER THE RELEVANT COMPETITION/ANTITRUST LAWS?*

Part II explores in greater depth the question of whether salary caps are legal in the United States and the European

136. *See* Lindholm, *supra* note 9, at 190 (describing early attempts at salary caps in European rugby leagues); *see also* Clarke, *supra* note 10, at 630 ("[T]here are currently no regulations mandating salary caps in Europe.").

137. *See* Lindholm, *supra* note 9, at 190 (comparing the amount of attention rugby league salary caps have drawn compared to the amount soccer leagues will likely receive); *see also* Clarke, *supra* note 10, at 630 (debating the possibility of a salary cap structure in European sports).

138. *See* Clarke, *supra* note 10, at 622–23 (discussing the Financial Fair Play rules); *see also FFP Regulations Approved* (announcing the approval of the Financial Fair Play Rules).

139. *FFP Explained, supra* note 11 ("The aggregate loss of Europe's top clubs was €578 million, with some 65% of income [being] spent on average on salaries, and 47% of clubs report[ing] losses."); *see* Paul Kelso, *Debt Ball: UEFA To Give Clubs Red Cards*, SYDNEY MORNING HERALD, Jan. 23, 2010, at 6 (explaining Financial Fair Play rules as a way to prevent teams from unsustainable short term spending).

140. *See* Lindholm, *supra* note 9, at 194 (comparing the Financial Fair Play salary cap to other salary cap structures); *see also* Kelso, *supra* note 139 (explaining the nuances of the spending limits of Financial Fair Play).

Union. Part II.A examines the issues that the United States has faced regarding salary caps and antitrust law. Then, Part II.B explains the recent trends in European competition law and analogizes those cases to potential salary cap issues.

A. *Antitrust Litigation over Salary Caps in the United States*

As long as salary caps have been used in US professional sports, they have been challenged as violations of the Sherman Act.[141] The most common defense offered for salary caps has been the non-statutory labor exemption.[142] There is little debate over whether the non-statutory labor exemption from antitrust law applies to salary caps where a labor union represents the players.[143] However, in situations where a players' association does not bargain over a restraint (or does not represent the players at all), there have been disagreements over whether the restraint is still subject to the non-statutory labor exemption.[144]

In 1987, a group of NBA players, through the NBPA, filed a suit challenging the pending CBA that would replace the expired 1980 agreement.[145] While bargaining for the new CBA, the NBA proposed a salary cap for the first time.[146] After some debate, the NBPA and the NBA ultimately agreed to add a salary

141. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (addressing the issue of salary caps in the NFL under antitrust law); Bridgeman v. NBA, 675 F. Supp. 960, 965 (D.N.J. 1987) (granting antitrust immunity to NBA when players sued for antitrust violation over salary cap).

142. *See, e.g.*, *Brown*, 518 U.S. at 243–44 (discussing non-statutory labor exemptions in sports antitrust cases); Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (discussing non-statutory labor exemption in non-sports antitrust case).

143. *See e.g.*, *Brown*, 518 U.S. at 250 (holding that when a labor union represents employees, the non–statutory labor exemption will be applied); Wood v. NBA, 809 F.2d 954, 956–57 (2d Cir. 1987) (holding that the non-statutory labor exemption applied to sports antitrust case).

144. *See* Clarett v. NFL, 369 F.3d 124, 142–43 (2d Cir. 2004) (holding that the non-statutory exemption applied, despite the league and the union not negotiating over the restraint in question). *But see* McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1197–98 (6th Cir. 1979) (holding that the non-statutory labor exemption did not apply where a union failed to bargain over the restraint in question).

145. *Bridgeman*, 675 F. Supp. at 962 (describing the factual background underlying the antitrust claim).

146. *Id.* (acknowledging that this was the first time that the NBA had tried to introduce a salary cap).

cap provision to the expired CBA, and to extend the CBA through the 1986–87 season.[147]

In February 1987, shortly before the season ended and the CBA was set to expire, both sides resumed negotiations.[148] This time, however, the NBPA and the NBA were unable to reach an agreement, and the CBA expired.[149] Pointing out that there was no longer a CBA in effect, the players argued that the non-statutory labor exemption should no longer apply, and brought an antitrust suit against the NBA in *Bridgeman v. NBA*.[150] The District of New Jersey disagreed, citing the non-statutory labor exemption's purpose, which was to "balance the concerns of the federal antitrust and labor laws," noting that "[t]he availability of the exemption turns upon whether the federal labor interest in collective bargaining is deserving of pre-eminence over the federal antitrust interest in free competition under the circumstances of the particular case."[151] District of New Jersey Judge Dickinson Debevoise used this reasoning to hold that there was "no merit in the players' contention that restrictions included in a collective bargaining agreement should lose their antitrust immunity the moment the agreement expires."[152]

Bridgeman was not the only case where players challenged an NBA rule through antitrust litigation.[153] In 1984, the Philadelphia 76ers drafted Leon Wood, offering him a one-year, US$75,000 contract.[154] However, the 76ers had already exceeded their cap, and so the team informed Wood that it intended to

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147. *Id.* at 962–63 (describing the agreement between the league and the players to a salary cap); *see* Larry Whiteside, *Inside Choice Stern Takes Over NBA Center Stage*, BOSTON GLOBE, Nov. 17, 1983 (reporting that the year began for the NBA with the passage of a new CBA, which included a salary cap).

148. *Bridgeman*, 675 F. Supp. at 963 (noting that CBA negotiations resumed in February of 1987); *see* Phil Jasner, *Sixers Fear the Worst on Ruland's Condition*, PHILA. DAILY NEWS, Feb. 12, 1987 (mentioning the beginning of NBA CBA negotiations).

149. *See Bridgeman*, 675 F. Supp. at 963 (recounting that upon a failure to reach an agreement between the league and the players, the CBA expired); *NBA Players Take Case to Court, File a Class-Action Suit*, L.A. TIMES, Oct. 2, 1987, at 10 (identifying the expiration date of the CBA).

150. *Bridgeman*, 675 F. Supp. at 964 (arguing that in the absence of a CBA in effect, the league's non-statutory labor exemption should no longer apply).

151. *Id.* at 965.

152. *Id.*

153. *See* Wood v. NBA, 809 F.2d 954, 956–57 (2d Cir. 1987) (characterizing the plaintiff's claim as one for an antitrust violation).

154. *See id.* at 958 (noting the details of Wood's initial contract).

restructure its roster to enable it to make a longer-term and more lucrative offer to the point-guard.[155] In September of 1984, Wood went to court, hoping to enjoin the agreement between the League and the players' association, as well as to force the 76ers and other NBA teams to stop refusing to deal with him except under the terms of the CBA.[156]

The district court denied Wood's motion, finding that the agreement, including the salary cap provisions, "affect[ed] only the parties to the collective bargaining agreement . . . [and as such, came] under the protective shield of our national labor policy and [were] exempt from the reach of the Sherman Act."[157] Wood appealed, claiming, *inter alia*, that the salary cap was a per se violation of the Sherman Act.[158] The Second Circuit held that his claim was clearly foreclosed by the non-statutory labor exemption, and that there was no occasion to address whether the salary cap was a per se violation or should be subject to rule of reason analysis.[159] Thus, the salary cap scheme was left in place for the 1988 CBA.[160]

When the 1988 CBA expired on June 23, 1994, the NBA brought an action against the players, arguing that the salary cap did not violate antitrust law.[161] The League argued that in *Wood v. National Basketball Association*, the Second Circuit had definitively held that the non-statutory labor exemption applied to salary caps, and as such, antitrust laws had no application.[162]

155. *Id.* (detailing the behind-the-scenes negotiations between Wood and the 76ers).

156. *Id.* (describing Wood's initial antitrust lawsuit against the league).

157. *Id.* (quoting Wood v. NBA, 602 F. Supp. 525, 528 (S.D.N.Y. 1984).

158. *Id.*

159. *Id.* at 959 (finding that Wood's arguments were a "wholesale subversion of [antitrust] policy, and . . . must be rejected out of hand. As a result, whether the draft and salary cap are per se violations of the antitrust laws or subject to rule of reason analysis need not be decided.").

160. *See* Staudohar, *supra* note 7, at 5 (noting that the salary cap continued after negotiations in 1988); *see also* Shaun Powell, *Released Player: Heat Racist*, MIAMI HERALD, Aug. 2, 1988, at 1D (mentioning that the salary cap would increase for the 1988–89 season).

161. NBA v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994) (describing the NBA's arguments against the antitrust lawsuit); *see* Dan Wasserman, *Supreme Court Ruling Is Slam Dunk for Owners*, STAR-LEDGER, June 21, 1996 (alluding to the Williams case).

162. *See Williams*, 857 F. Supp. at 1073–74 (describing the league's arguments in favor of the non-statutory labor exemption).

The players countered that, unlike in *Wood*, the CBA in their case had officially expired, and therefore the non-statutory labor exemption should not apply.[163] Citing *Powell v. NFL*, Judge Kevin Duffy of the Southern District of New York held that the League's antitrust immunity continued beyond the expiration of the CBA, as long as a collective bargaining relationship existed.[164]

His analysis, however, did not stop there. In dicta, Judge Duffy opined that "even if the nonstatutory exemption did not apply, the Players' charge of a per se violation of Section 1 of the Sherman Act . . . is insufficient to carry the day."[165] He noted that professional sports leagues are joint ventures, and as such, should be analyzed under a rule of reason standard.[166] He then proceeded to comment that "[e]ven under a rule of reason analysis . . . the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive."[167] The Second Circuit affirmed Judge Duffy's holding that the non-statutory exemption applied, even though the CBA had expired, but declined to address the arguments he made in dicta.[168] Having survived another antitrust lawsuit, the salary cap scheme stayed in place largely as it was.[169]

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163. *Id.* at 1074.

164. *Id.* at 1078 (citing Powell v. NFL, 930 F.2d 1293, 1303–04 (8th Cir. 1989)) ("Antitrust immunity exists as long as a collective bargaining *relationship* exists.") (emphasis added). In using this logic, Judge Duffy pointed out that the players were not stuck forever with the provisions from the expired CBA. *Id.* He noted that the players could apply economic pressure to bargain for different provisions and always had the option of decertifying the union and bringing an antitrust claim then. *Id.*

165. *Id.* at 1078.

166. *See id.*

167. *Id.* at 1079.

168. *See* Nat'l Basketball Ass'n v. Williams, 45 F.3d 584, 688 (2d Cir. 2004) ("Because the Players' position appears to be inconsistent with the approach taken under the antitrust laws regardless of labor law and, in any event, collides head-on with the labor laws' endorsement of multiemployer collective bargaining, we conclude that the Players' claim must fail. We need not, therefore, address the various arguments pro and con regarding the Rule of Reason.").

169. *See generally Williams*, 857 F. Supp. at 1079; *No Violation*, DOMINION POST, Jan. 26, 1995, at 19 (reporting the court's denial that the NBA violated antitrust laws by continuing the salary cap after the CBA expired in 1994).

In 1996, the Supreme Court reaffirmed the *Bridgeman* holding in the context of professional football.[170] In 1987, the CBA between the NFL and the NFLPA expired.[171] During negotiations, the NFL created a system that would allow teams to maintain developmental squads and proposed a US$1,000 per-week, per-player salary.[172] After failing to agree to terms with the NFLPA during collective bargaining, the NFL unilaterally imposed the system.[173]

The development squad players responded by filing a lawsuit against the NFL, claiming that the imposed weekly salary was a violation of the Sherman Act.[174] In a ruling that closely resembled the district court's holding in *Bridgeman*, the Supreme Court held that the NFL was shielded from antitrust litigation by the non-statutory labor exemption even though there was no CBA in effect.[175]

B. *Salary Caps in the EU*

Contrary to the United States, salary caps in the European Union have never been directly challenged in court.[176] Nevertheless, there has been no shortage of debate over whether salary caps will or should be permitted under existing EU competition law.[177] For its part, the European Commission, which initiates EU legislation, has expressly declared that it is undecided as to whether salary caps will violate competition

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170. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 244–45 (1996) (holding that the non-statutory labor exemption does not disappear once the parties reach a bargaining impasse).

171. *Id.* at 234.

172. *Id.* (summarizing factual background of the case).

173. *Id.* at 235 (noting that the NFL acted unilaterally in imposing the developmental squad player fixed salary).

174. *Id.* at 234 (articulating the claims made by the players arguing that such a structure was a violation of antitrust law).

175. *Id.* (applying the non-statutory exemption because the conduct "grew out of, and was directly related to, the lawful operation of the bargaining process.").

176. *See White Paper*, *supra* note 101, ¶ 2.3 (listing pending and undecided issues of competition in sports); *see also* Chris Davies, *The Financial Crisis in the English Premier League: Is a Salary Cap the Answer?*, E.C.L.R. 2010, 31(11), 442, 444 (2010) ("[I]t should be noted that salary caps have, so far, never actually been challenged in court.").

177. *See, e.g.*, Davies, *supra* note 176, at 446–47 (debating the values of a salary cap in the English Premier League); RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 156 (Simon Bulmer et al. eds., 2003) (balancing the positives and negatives of a salary cap in European sports).

law.[178] Commentators widely believe that a salary cap in the European Union would be overturned if challenged in court.[179] These observers have opined that a salary cap scheme would be considered overly restrictive, and would fail under TFEU Article 101.[180]

It is also true, however, that soccer is extremely important to Europeans, and its preservation is of paramount importance.[181] Thus, the question becomes, how can the European Commission best achieve its goal of "contribut[ing] to the promotion of European sporting issues, while taking account of the specific nature of sport" while also accounting for the mandates under Article 101 of the TFEU?[182] The answer lies in the ECJ's ability to balance these competing interests as it considers the enforceability of salary caps.

Salary caps have a long, well-litigated history in US sports. US courts have generally found salary caps to be permissible in professional sports leagues, largely thanks to the non-statutory labor exemption. The European Union, conversely, is just now beginning to broach the subject of salary caps. It is still unknown how the ECJ will deal with salary caps when applying competition law policies. What is known, however, is that

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178. *See White Paper, supra* note 101, ¶ 2.3 (identifying "the idea of introducing salary caps in professional football" as an "outstanding legal issue[ ]"); *see EU Commission Considers Salary and Transfer Fee Cap*, FC BUSINESS (Feb. 23, 2011), http://fcbusiness.co.uk/news/article/newsitem=986/title=eu+commission+considers+salary+and+transfer+fee+cap (emphasis added) ("[T]he European Commission *will* look into the possibility of taking action, *including capping fees.*"). The European Commission is responsible for passing legislation for the EU, as well as ensuring that EU law is applied throughout the member states. *See generally* EUROPEAN COMMISSION, http://ec.europa.eu/legislation/index_en.htm (last visited Aug. 13, 2012).

179. *See, e.g.*, Snyder, *supra* note 8, at 519 (opining that a salary cap would likely be a violation of Article 101); *see also* Schiera, *supra* note 7, at 736 (arguing that the EC would likely not accept an argument that a hard salary cap is necessary).

180. *See, e.g.*, Paul Harris, *What Position do Team Salary Caps Play in the Game of Competitive Balance?*, MONCKTON CHAMBERS (1999) (opining that salary caps are an unreasonable restraint of trade); *see also* Schiera, *supra* note 7, at 735–36 (asserting that a hard salary cap would likely be too restrictive under Article 101).

181. *See* Tony Karon, *What Soccer Means to the World*, TIME (July 21, 2004), http://www.time.com/time/arts/article/0,8599,671302,00.html (musing on the importance of soccer to the world, and in particular, Europe); *see generally The Social and Community Value of Football*, SUPPORTERS DIRECT (June, 2010), http://www.supporters-direct.org/wp-content/uploads/2012/08/The-Social-Value-of-Football-2010.pdf (documenting soccer's importance to Europe).

182. TFEU, *supra* note 77, art. 165, 2008 O.J. C 115/47, at 120.

European soccer clubs are losing large sums of money due to excessive team payrolls.[183]

III. *LEADING BY EXAMPLE: UEFA AND THE ECJ SHOULD FIND A WAY TO MAKE SALARY CAPS WORK IN THE EUROPEAN UNION*

Part III recommends that UEFA should follow the United States' lead and implement its salary cap structure. Part III.A argues that UEFA should utilize collective bargaining with a union to achieve this goal. Part III.B argues that, even in the absence of collective bargaining, the ECJ should find that competitive balance justifies the salary cap. Finally, Part III concludes that the fate of UEFA, both competitively and economically, hangs in the balance, and that in order to save it, salary caps must be exempted from competition law.

A. *UEFA Should Try to Implement the Salary Cap Structure Through Collective Bargaining*

The best way for UEFA to ensure immunity from competition law is by pushing the largely untested European version of the non-statutory labor exemption. This is the most effective method of implementing a restraint like a salary cap. Reinforcing the European non-statutory labor exemption will also serve to provide a measure of immunity from competition law in the future.[184]

Despite not formally acknowledging the existence of a blanket non-statutory labor exemption in the sports competition law arena, the ECJ has shown signs that it is amenable to such a defense.[185] In the United States, the non-statutory labor exemption has been extremely successful in providing immunity

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183. *See* Clout, *supra* note 11 (detailing the financial losses incurred by European soccer teams); *see also Soccer Shorts*, IRISH TIMES, May 24, 2012, at 16 (recounting the financial losses endured by English Premier League clubs in 2010–11).

184. *See supra* note 98 and accompanying text (discussing the exemption sports receive from competition law when collective bargaining takes place).

185. *See supra* note 98 and accompanying text (characterizing the European Court of Justice ("ECJ") as being willing to grant limited antitrust exemptions in cases involving collective bargaining).

from antitrust liability in professional sports.[186] From salary caps in the NBA to fixed salaries for developmental players in the NFL, US courts have consistently found that the non-statutory labor exemption immunizes leagues and unions from antitrust liability.[187]

Although there are several ways in which UEFA can attempt to implement a legal salary cap, doing so via collective bargaining is likely more effective than any of the other methods. Should UEFA implement a salary cap through collective bargaining, it can look to the successful, stable, US model for guidance.[188] Given the ECJ's move toward accepting a non-statutory labor exemption defense, in conjunction with the long history of guidance from US courts, UEFA's chances of achieving a salary cap scheme would be greatly enhanced by following this method.[189]

B. *The ECJ Should Find that Competitive Balance Justifies Salary Caps in UEFA*

If UEFA is unable or unwilling to collectively bargain with FIFPro Division Europe, there is still a possibility that a salary cap structure could survive. If the ECJ does not grant immunity in the form of a non-statutory labor exemption, it will be in a position to adjudicate UEFA's salary cap structure on the merits as a matter of first impression.[190] If this is the case, then the ECJ should take a long look at the history of such litigation in the United States.[191]

The United States has had the luxury of not needing to address the legality of salary caps under the Sherman Act

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186. *See supra* notes 30–31 (listing a number of cases where the non-statutory labor exemption was applied to sports antitrust cases).

187. *See supra* note 31 and accompanying text (giving examples of non-statutory labor exemptions in sports).

188. *See supra* notes 26–31 (demonstrating the stability and uniformity of court rulings under the non–statutory labor exemption).

189. *See supra* notes 29–31, 95–98 (summarizing US jurisprudence on non-statutory labor exemption in professional sports, as well as the judicial shift in the European Union towards limited antitrust immunity where there is a collective bargaining relationship in place).

190. *See supra* notes 175–77 and accompanying text (noting that salary caps have not been directly challenged in the ECJ).

191. *See supra* notes 21–31 and accompanying text (outlining the application of antitrust law to sports in the United States).

because of the non-statutory labor exemption.[192] Since virtually all sports in the United States are conducted against the backdrop of labor unions, the US Supreme Court has never had the opportunity to actually decide the issue of whether a salary cap structure, in the absence of a union, would survive rule of reason analysis.[193] Although it never officially issued a holding on the merits of an antitrust suit over salary caps, the Court engaged in some very telling dicta in *American Needle*.[194]

Historically, the ECJ has declined to engage in rule of reason analysis.[195] Recently, however, the court has been moving towards a US-style rule of reason analysis, in which a court balances the necessity of a restraint against its anti-competitive effects.[196] The ECJ should seize this opportunity to firmly establish the goal of competitive balance as a legitimate and important justification for a restraint of trade, like the United States has done.[197] This is not to say that the ECJ should reinstate the "purely sporting" exception, which it already explicitly rejected.[198] To put regulations such as salary caps entirely outside of the scope of competition law would be to overrule *Meca-Medina*, and would go even further than the United States has gone in granting immunity in various situations to sports leagues.[199]

By adjudicating the salary cap issue with guidance from the Supreme Court's finding that competitive balance is a critical interest, the ECJ could easily find that such an interest justifies

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192. *See supra* notes 142–43 (citing cases in which the non-statutory labor exemption obviated the court's need to address the legality of salary caps under antitrust law).

193. *See supra* notes 67–73 (remanding the issue of salary under the rule of reason to the district court).

194. *See supra* notes 73–76 (describing competitive balance as a legitimate and important interest which could potentially overcome rule of reason analysis).

195. *See supra* notes 102–103 and accompanying text (examining the ECJ's stance on the weighing of pro- and anti-competitive effects).

196. *See supra* notes 104–13 and accompanying text (commenting on the ECJ's move towards a limited non-statutory labor exemption).

197. *See supra* notes 48–49 and accompanying text (recognizing competitive balance as a legitimate league interest).

198. *See supra* notes 100–01 and accompanying text (rejecting the "purely sporting exception" rule).

199. *See supra* notes 21–31, 104–08 and accompanying text (detailing the application of US antitrust law to sports, and the holding of *Meca-Medina*).

the anti-competitive nature of the restraint.[200] Such a finding would pave the way for UEFA, as well as all EU sports leagues, to achieve financial stability and competitive balance. The result of such achievements would be the improvement of the product for all by increasing uncertainty in results while simultaneously lowering the cost of producing sporting events.[201]

CONCLUSION

If UEFA wants to remain an economically viable organization, it must maintain competitive balance.[202] It has attempted to do so by instituting salary caps.[203] Despite potentially running up against European competition law, it is not inevitable that the ECJ will strike down the scheme.[204] If UEFA decides to implement its salary cap structure via collective bargaining with a labor union such as FIFPro Division Europe, the ECJ may apply a non-statutory labor exemption.[205] Even in the absence of collective bargaining in the implementation of a salary cap, the ECJ can still find that UEFA's interest in competitive balance is sufficient to overcome the modified rule of reason analysis that the ECJ has started employing in recent years.[206] Whichever route the ECJ elects to follow, it would be well served to learn from the experience of its US counterparts, and to find a way to immunize salary caps from competition liability. The clock is ticking on UEFA's chances to implement a salary cap, without which it may never be able to reign in excessive costs. It is up to the ECJ to exempt salary caps from competition law to maintain competitive balance and financial

200. *See supra* notes 48–49 and accompanying text (acknowledging the legitimacy and importance of competitive balance to sports leagues).

201. *See supra* notes 3–8 and accompanying text (describing the benefits of salary caps).

202. *See supra* notes 3–8 and accompanying text (discussing the importance of competitive balance to the success of sports leagues).

203. *See supra* notes 136–38 and accompanying text (documenting the introduction of a salary cap to UEFA).

204. *See* TFEU, *supra* note 77, art. 101, 2008 O.J. C 115/47, at 88.

205. *See supra* notes 95–98 and accompanying text (describing the European version of the non-statutory labor exemption).

206. *See supra* notes 104–13 and accompanying text (establishing the ECJ's recent trend towards a modified rule of reason analysis in sports competition litigation).

viability within UEFA. The ball is in the ECJ's court; it is up to it to draw up the right play.