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UEFA's Financial Fair Play: Purpose, Effect, and Future

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NOTE

UEFA'S FINANCIAL FAIR PLAY: PURPOSE, EFFECT, AND FUTURE

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* Volume XLII, Writing and Research Editor; J.D. Candidate, 2019, Fordham University School of Law; B.S., 2016, *magna cum laude*, Fordham University's Gabelli School of Business. Thank you to my family, friends, and loved ones for their fervent and unwavering support and motivation, and to all the passionate football fans around the world who truly make football the "beautiful game." Thank you also to Professor Martin Gelter for his guidance and to the staff and editors of the *Fordham International Law Journal* for their tremendous effort and pristine work. Please note that the basis for this Note is the 2015 Edition of the UEFA Club Licensing and Financial Fair Play Regulations, and that this Note does not look at events beyond January 1, 2019.

I. INTRODUCTION

During the 2017 summer transfer window, the football world was turned on its head when French powerhouse, Paris Saint-Germain

("PSG"), undertook a record-breaking spending spree.[1] PSG purchased Neymar da Silva Santos Junior from Barcelona FC for approximately EU€221 million, breaking the previous record set by Manchester United's EU€96 million purchase of Paul Pogba from Juventus during the 2016 summer transfer window.[2] PSG followed this record-breaking purchase with a deal to purchase teenage French sensation, Kylian Mbappe, from AS Monaco FC for a future fee of approximately EU€178 million, made payable in 2018.[3] These transfers have brought into question European football's governing body, the Union of European Football Associations ("UEFA"), and its regulations intended to prevent exorbitant transfers and teams spending beyond their means. In 2010, UEFA promulgated rules intended to curtail clubs' reckless spending and imprudent corporate governance. These rules are called the Financial Fair Play Regulations ("FFP").

Since their promulgation, UEFA has sparingly issued severe punishments for clubs' failures to comply with FFP. PSG's 2017 summer spending spree is likely an egregious violation of FFP. Consequently, UEFA's resolve will be put to the test when determining what, if any, repercussions will follow. To complicate this issue, legal uncertainties surrounding FFP create a dilemma for UEFA and has placed the governing body in a precarious situation. UEFA can either impose severe sanctions and face the legal challenges PSG would likely file in response or impose tempered sanctions and leave FFP toothless.

This Note provides background on UEFA's Financial Fair Play Regulations and its purposes, effects, questionable legality, and inefficiencies. This Note then proposes potential avenues of improvement to remove UEFA from its precarious situation and ensure that the regulations are effective in accomplishing its stated goals. UEFA's Financial Fair Play Regulations have effectuated corporate efficiency and effective governance amongst European football clubs.

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1. *See* David Conn, *Paris St-Germain signing of Kylian Mbappé looks like defiance of Uefa*, THE GUARDIAN (Aug. 30, 2017), https://www.theguardian.com/football/2017/aug/30/psg-kylian-mbappe-neymar-uefa-financial-fair-play [https://perma.cc/P97J-FREL]; *see also Most expensive transfers of all-time: Neymar, Mbappe, Pogba, Ronaldo and more*, ESPN (July 10, 2018), http://www.espn.com/soccer/blog/soccer-transfers/3/post/2915603/most-expensive-transfers-of-all-time-neymar-mbappe-pogba-ronaldo-and-more (last visited Mar. 12, 2019) [https://perma.cc/V9BM-KEF7] [hereinafter *Most expensive transfers*].; Currency converter that was used was: *Historic Lookup*, X-RATES, https://www.x-rates.com/historical/?from=GBP&amount=160000000&date=2018-08-31 [https://perma.cc/QJ82-DQGF].

2. *See* Conn, *supra* note 1; *Most expensive transfers*, *supra* note 1.

3. *See* Conn, *supra* note 1; *Most expensive transfers*, *supra* note 1.

This has yielded positive effects. Thus, this Note only calls for modifications to FFP, not a complete overhaul or revocation.

Part II of this Note provides an introduction to UEFA, its creation, subdivisions, and governing bodies. Part III reviews the reasons for FFP's promulgation, its purposes, and its governing provisions. After reviewing FFP's origins, purposes, and governing provisions, Part IV of this Note analyzes the arguments in support of FFP, discusses the political support FFP has received, and examines the positive results since its implementation. Part V of this Note then analyzes the severity of FFP's legal flaws spurned by potential anti-competition claims and discusses the regulatory issues and oversights that plague FFP. Finally, Part VI offers potential solutions to FFP's issues discussed in Part V.

II. UEFA'S ORIGIN AND STRUCTURE

A. UEFA's History

In 1954, UEFA was created as one of the six confederations within the Fédération Internationale de Football Association ("FIFA"), the international governing body of football.[4] UEFA serves as an association of associations.[5] It consists of fifty-five European national football associations.[6] Generally, each European country has one national football association.[7] A nation's football association is comprised of its own leagues and regional associations.[8] The leagues and regional associations are composed of the respective nation's football clubs.[9]

UEFA's listed objectives, amongst others, are to answer questions relating to European football, to promote football, fair play, and good governance, maintain relations with European football stakeholders,

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4. *See* Valeria Kaplan, *Comment: UEFA Financial Fair Play Regulations and European Union Antitrust Law Complications*, 29 EMORY INT'L L. REV. 799, 800 (2015).

5. *About UEFA*, UEFA, http://www.uefa.com/insideuefa/about-uefa/ [https://perma.cc/3PAR-B4XX] (last visited May 14, 2018).

6. *See id*.

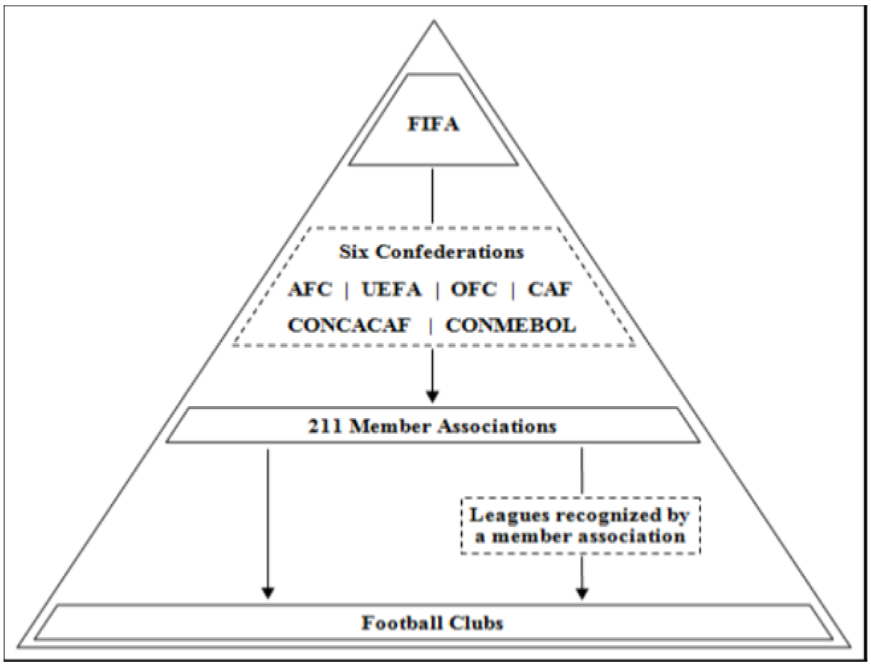
7. *See id*.

8. Kaplan, *supra* note 4, at 803; MATTHEW HOLT, UEFA'S GOVERNANCE & THE CONTROL OF CLUB COMPETITION IN EUROPEAN FOOTBALL 10 (2009), *available at* http://www.sportbusinesscentre.com/wp-content/uploads/2012/08/UEFA1.pdf [https://perma.cc/3GG3-A8TE].

9. *See* Kaplan, *supra* note 4, at 803; HOLT, *supra* note 8, at 10.

and support and safeguard its member associations "for the overall well-being of the European game."[10] UEFA is listed in the register of companies under the Swiss Civil Code and is headquartered in Nyon, Switzerland.[11]

Figure 1:[12]



One of UEFA's primary functions is to administer the European competitions.[13] The most important competitions that UEFA is tasked with administering are the European Championship, Champions League, and the Europa League.[14] These competitions rank closely in ratings to the World Cup and provide tremendous revenue streams for

10. *About UEFA*, *supra* note 5.

11. *See About UEFA*, *supra* note 5; *Zefix – Centeral Business Name Index,* ZEFIX, https://www.zefix.ch/en/search/entity/list?name=Union%20des%20Associations%20Europ%C3%A9ennes%20de%20Football [https://perma.cc/56GS-Y3ZV] (last visited Mar. 31).

12. Suren Gomstsain et al., *Between the Green Pitch and The Red Tape: The Private Legal Order of FIFA*, 43 YALE J. INT'L L. 85, 97-98 (2018).

13. *See* Kaplan, *supra* note 4, at 802-03; *see also* Gomstsain, *supra* note 12, at 97-98.

14. Thomas Peeters & Stefan Szymanski, *Financial Fair Play and Financial Crisis in European Football* 7 (Economic Policy Fifty-Eighth Panel Meeting supported by the Bank of Lithuania, 2013).

participants.[15] The European Championship, known as "The Euros," is the continental competition for all European national teams.[16] The Champions League is the premier club football competition in the world.[17] The Champions League participants are the top performing teams in the highest leagues of each European country.[18] The Europa League, though still a prominent tournament, is a subordinate competition for teams that finished just below the top performing teams in each league and half the clubs that are knocked out of the first round of the Champions League.[19] In addition to performing well, qualifying clubs are required to be licensed by UEFA.[20] However, as discussed in Part III, compliance with FFP is a significant obstacle in obtaining such license.

B. UEFA's Structure

UEFA acts through its "organs": UEFA Congress, UEFA Executive Committee, UEFA President, and sub-organs for the administration of justice.[21] Any disputes that arise between UEFA and associations, leagues, clubs, players, and officials may be dealt with by the Court of Arbitration of Sport ("CAS"), which is based in Lausanne, Switzerland.[22]

UEFA Congress is UEFA's leading control organ.[23] It holds a congressional session each year and is attended by representatives from each of UEFA's fifty-five national member associations.[24] The UEFA Executive Committee is the supreme executive body and is comprised

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15. STEFANO DE ANGELIS, EXPLOITATION OF BRAND EQUITY IN FOOTBALL CLUBS ACROSS COUNTRIES 19 (2016), *available at* https://tesi.luiss.it/18927/1/667311_DE%20ANGELIS_STEFANO.pdf [https://perma.cc/MC2U-QPXB].

16. *European Championship Football Tournament*, BRITANNICA, https://www.britannica.com/sports/European-Championship [https://perma.cc/ADN2-2F2H] (last visited Feb. 13, 2019).

17. *See id*.

18. Kaplan, *supra* note 4, at 805.

19. *See* Kaplan, *supra* note 4, at 805.

20. *See* Kaplan, *supra* note 4, at 805.

21. *About UEFA*, *supra* note 5.

22. *About UEFA*, *supra* note 5.

23. *What UEFA does*, UEFA, https://www.uefa.com/insideuefa/about-uefa/what-uefa-does/ [https://perma.cc/VMV9-3UFR] (last updated Jan. 22, 2019); *UEFA Congress*, UEFA, https://www.uefa.com/insideuefa/about-uefa/organisation/congress/ [https://perma.cc/JR5W-E2TE] (last updated Feb. 13, 2019).

24. *UEFA Congress*, *supra* note 23.

of the UEFA President, Aleksander Čeferin, and sixteen other members.[25] The UEFA Executive Committee adopts regulations and is the decision maker on all matters that do not fall into the purview of the UEFA Congress or any other UEFA organ.[26] The UEFA President represents the organization, serves as the chair of the UEFA Congress, and meets with the UEFA Executive Committee.[27] In the event of a tie in votes, the UEFA President has the casting vote.[28] It was this committee that unanimously approved and passed FFP in 2009 under famous former president Michel Platini.[29]

The Organs for the Administration of Justice are UEFA's disciplinary bodies.[30]. The formation of the Club Financial Control Body ("CFCB") was approved by the UEFA Executive Committee in June 2012 to monitor the operation of the UEFA Club Licensing and Financial Fair Play Regulations.[31] The CFCB replaced the Financial Control Panel with the added capacity to adjudicate cases relating to clubs' compliance with FFP and to enforce the regulations.[32]

CFCB decisions regarding FFP compliance are initially made via its investigatory chamber.[33] Investigations can commence "ex officio" or by request.[34] After the investigation is concluded, the investigators have the authority to dismiss the case, enter into a Settlement Agreement with the club, impose a warning and a fine up to a maximum amount of EU€100,000, or refer the case to the Adjudicatory Chamber.[35]

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25. *UEFA Congress*, *supra* note 23.

26. *UEFA Congress*, *supra* note 23.

27. *UEFA President: Aleksander Čeferin*, UEFA, https://www.uefa.com/insideuefa/about-uefa/president/ [https://perma.cc/YW57-EYBC] (last updated Jan. 22, 2019).

28. *See id*.

29. *Protecting the Game*, UEFA, https://www.uefa.com/insideuefa/protecting-the-game/club-licensing-and-financial-fair-play/index.html [https://perma.cc/4WHR-YVC8] (last visited May 14, 2018).

30. *About UEFA*, *supra* note 5. For purposes of this Note, the relevant disciplinary body is the two-chamber Club Financial Control Body ("CFCB").

31. *Protecting the Game*, *supra* note 29.

32. *Protecting the Game*, *supra* note 29.

33. *Protecting the Game*, *supra* note 29.

34. *Club Financial Control Body Investigatory Chamber*, UEFA, http://www.uefa.com/insideuefa/disciplinary/club-financial-controlling-body/investigatory-chamber/index.html?redirectFromOrg=true [https://perma.cc/8NM6-N6BH] (last visited May 14, 2018).

35. *See id*.

The Adjudicatory Chamber decides on cases that are either referred to it by the investigator or on request by a directly affected party.[36] Decisions are made by a simple majority.[37] The Adjudicatory Chamber has the authority to either dismiss the case, accept or reject the clubs admission to a UEFA competition, impose disciplinary measures, or to affirm, reject, or modify a decision by an investigator.[38] Disciplinary measures that the Adjudicatory Chamber can impose include: a warning, fine, deduction of league points, withholding of revenues from a UEFA competition, suspension of registering new players for UEFA competitions, imposing a cap on the number of players that a club can register to participate in a UEFA competition, disqualification from present or future competitions, and in the most severe cases, withdrawal of a title or award.[39] All decisions are published.[40]

III. FINANCIAL FAIR PLAY REGULATIONS' GENESIS, PURPOSES, AND PROVISIONS

A. Reasons for Financial Fair Play Regulations

All clubs hope to find themselves fighting for a chance to enter the Champions League or Europa League because of the financial gain it produces for each participant.[41] In 2015, every team that participated in the groups stage (the opening round) of the Champions League earned approximately EU€12 million.[42] Additionally, a club earned an extra EU€1.5 million for every win and EU€500,000 for every loss.[43] If a club made it to the next round, it earned EU€5.5 million.[44] Advancement to the quarterfinals led to an additional earning of EU€6 million and semifinalists earned EU€7 million.[45] Winners of the tournament took an additional EU€15 million while the runner up took

36. *See id.*
37. *See id*.
38. *See id*.
39. *See id*.
40. *Protecting the Game*, *supra* note 29.
41. Kaplan, *supra* note 4, at 805.
42. *See* Kaplan, *supra* note 4, at 805-06; De Angelis, *supra* note 15, at 19.
43. De Angelis, *supra* note 15, at 19.
44. *See* De Angelis, *supra* note 15, at 19.
45. *See* De Angelis, *supra* note 15, at 19.

home an additional EU€10.5 million.[46] Ultimately, the total earnings for the winning club was approximately EU€54.5 million.[47] Though less than that of the Champions League, the potential revenue in the Europa League is still significant. In 2015, participation in the group stage earned EU€2.6 million, with an additional EU€360,000 for every win, and EU€120,000 for every draw.[48] A club earned EU€500,000 if it made it through the group stage, EU€750,000 if it made it to the round of sixteen, EU€1 million for the quarterfinals, and EU€1.6 million for a semifinals appearance.[49] The champion earned an additional EU€6.5, while the runner up earned EU€3.5.[50] Thus, the potential maximum income for a Europa League participant in 2015 was EU€15.71 million.[51]

UEFA's Financial Fair Play Regulations are limited to teams that choose to compete in its competitions.[52] However, because both European competitions are lucrative, major clubs from every association aspire to qualify for them.[53] Nevertheless, for those teams that do not have a probable chance of entering the tournament, the associations have passed similar rules to prevent financial mismanagement and ensure clubs' viability.[54]

The UEFA Financial Fair Play Regulations were spurned by the threat of failing European football clubs. Clubs became less risk averse in their spending in an attempt to qualify for the prestigious tournaments, which in turn would improve revenue.[55] Many of these clubs took on significant debt and irresponsibly spent large sums of money to bring in players.[56] Many clubs took gambles on acquiring players and incurred exorbitant transfer fees and salaries, which they could not afford given their normal revenues, with the hope that on the field success would follow and revenues would increase to a point

46. *See* De Angelis, *supra* note 15, at 19.
47. *See* De Angelis, *supra* note 15, at 19.
48. *See* De Angelis, *supra* note 15, at 19.
49. *See* De Angelis, *supra* note 15, at 19.
50. *See* De Angelis, *supra* note 15, at 19.
51. *See* De Angelis, *supra* note 15, at 19.
52. Samuel Kilb, *Fixing Financial Fair Play: How to Make European Soccer's Salary Cap Stick*, 1 INDON. J. INT'L & COMP. L. 808, 811 (2014).
53. *See id*.
54. *See id*.
55. *See* Kaplan, *supra* note 4, at 807.
56. *See* Kaplan, *supra* note 4, at 807.

where their costs would be covered.[57] Such poor corporate mismanagement and risk-taking led to poor financial health for large clubs.[58]

Reports from 2009 showed that two-thirds of the clubs in England's top two leagues spent more than seventy percent of their revenues on player wages.[59] To put this into context, American professional sports teams spend approximately fifty percent of their revenues on player wages.[60] As a result of such reckless spending, there were approximately forty formal insolvencies of professional English football clubs from 2000 to 2015.[61] This does not include clubs that avoided formal insolvency due to deferred payment arrangements.[62]

Financial distress was prevalent throughout European football. For example, Valencia Club de Fútbol ("Valencia CF"), a prominent Spanish football club, experienced day-to-day operational issues due to poor financial management and excessive debt.[63] Glasgow Rangers Football Club ("Rangers FC"), was one of the most famous clubs in the world, and one of the two most successful clubs in Scotland.[64] Poor financial management led to the team's ultimate dissolution and reformation in 2012.[65] Once one of the premier teams in the world, Rangers F.C. played in Scotland's fourth tier division for the 2012-13 season and left Celtic Glasgow Football Club ("Celtic FC"), their crosstown rival, with a monopoly-like control on the Scottish Premier League.[66] Due to the lack of competition, the Scottish Premiership became predictable, which in turn led to lower fan turnout and bottom line pressure throughout the league.[67]

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57. Mark Hovell & Tiran Gunawardena, *UEFA's Financial Fair Play Regulations: Saving Football from Itself*, 32 ENT. & SPORT L. 37, 38 (2015).
58. *See* Kaplan, *supra* note 4, at 807.
59. *See* Hovell & Gunawardena, *supra* note 57, at 38.
60. *See* Hovell & Gunawardena, *supra* note 57, at 38.
61. *See* Hovell & Gunawardena, *supra* note 57, at 38.
62. *See* Hovell & Gunawardena, *supra* note 57, at 38.
63. *See* Kaplan, *supra* note 4, at 807.
64. *See* Kilb, *supra* note 52, at 810.
65. *See* Kilb, *supra* note 52, at 810.
66. *See* Kilb, *supra* note 52, at 810.
67. *See* Kilb, *supra* note 52, at 810 *; see generally* Chris Davies, *Labour Market Controls and Sport in Light of UEFA' Financial Fair Play Regulations*, 33 EUR. COMPETITION L. REV. 443 (2012).

In 2012, European football clubs totaled EU€2.036 billion in debt.[68] This was an increase of EU€453 million from 2009 and up a resounding 153% from 2008.[69] According to UEFA, in 2010, more than fifty percent of all top division clubs in Europe were operating at a loss.[70] For twenty-eight percent of clubs, player salaries constituted more than 120% of revenue.[71] This was largely due to the increase in player wages, which was fueled by excessive risk-taking by the football clubs.[72] In Italy, there was tremendous financial chaos and poor management.[73] From 1996 to 2007 there was an accumulated loss of approximately EU€951 million, and from 1996 to 2002, there was an increase in player salaries of more than 700 percent amongst the top six clubs.[74] Many of the Italian clubs faced issues of indebtedness and incapacity to refinance debt.[75] However, despite operational dysfunction, these clubs experienced high survival rates due to either owner bailouts, also known as "sugar daddies," or because creditors accepted debt arrears and non-payment of debt.[76] These wealthy benefactors injected additional revenues, either through equity or by debt, to help cover the losses caused by these speculative player investments.[77]

With such ownership safeguards, club managers were not incentivized to manage costs and became dependent on wealthy owners to cover mistakes.[78] As a result, wealthy benefactors' continuous cash

68. *See* Kilb, *supra* note 52, at 810; J. Christian Muller et al., *The Financial Fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability of European Club Football?*, 7 INT'L J. SPORT FIN. 117, 119 (2012).

69. *See* Kilb, *supra* note 52, at 810.

70. Rasmus K. Storm & Klaus Nielsen, *Profit Maximization, Win Optimization and Soft Budget Constraints in Professional Team Sports*, 12 EUR. SPORT MGMT. Q. 1 (2012).

71. *See id*.

72. *See Top footballers' wages rise 1,500% in 20 years*, THE GUARDIAN (Aug. 20, 2012), https://www.theguardian.com/football/2012/aug/20/footballers-wages-rise-tickets [https://perma.cc/H9UH-VNVZ] [hereinafter Rise in Footballers' Wages].

73. Storm & Nielsen, *supra* note 70 at 6; *see also* Stephen Morrow, *Impression Management in Football Club Financial Reporting*, INT'L J. OF SPORT FIN., 1, 16-17 (2006)

74. Storm & Nielsen, *supra* note 70 at 6. Conversion to euro was done using the following website: *Historical Converter*, FXTOP, http://fxtop.com/en/historical-currency-converter.php?A=1400000000&C1=USD&C2=EUR&DD=31&MM=12&YYYY=2007&B=1&P=&I=1&btnOK=Go%21 [https://perma.cc/AT2X-7FDY] (last visited March 12, 2019).

75. *See* Storm & Nielsen, *supra* note 70.

76. *See* Storm & Nielsen, *supra* note 70 at 10.

77. Hovell & Gunawardena, *supra* note 57, at 38.

78. *See* Hovell & Gunawardena, *supra* note 57, at 38.

injections promoted risky player investments.[79] It became evident that sugar daddies contributed to the financial deterioration of these football clubs because the safety blanket they provided undermined the need for risk aversion and financial prudence.[80] Unfortunately for many clubs who relied on wealthy benefactors, there came a breaking point where the benefactors could no longer cover the deficits.[81] This caused the respective clubs to plummet into financial chaos.[82] In Italy and England, large successful clubs were forced to undergo financial restructurings, ownership reshuffling, and large player sales to service the debt load after the once dependent owners found it difficult to continue to provide stop-gap funding.[83] In response, the primary objectives of FFP were the tempering of risky player investment and mitigation of football clubs' reliance on wealthy benefactors.[84]

B. Financial Fair Play Regulations' Purposes

In response to the financial issues with European clubs, UEFA promulgated FFP with the following stated purposes:

> 1. To improve the economic and financial capabilities of the clubs, increasing their transparency and credibility;
>
> 2. To place the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with employees, social/tax authorities and other clubs punctually;
>
> 3. To introduce more discipline and rationality in club football finances;
>
> 4. To encourage clubs to operate on the basis of their own revenues;
>
> 5. To encourage responsible spending for the long-term benefit of football; and

79. Kilb, *supra* note 52, at 815.

80. *See* Kilb, *supra* note 52, at 815.

81. Hovell & Gunawardena, *supra* note 57, at 38.

82. *See* Hovell & Gunawardena, *supra* note 57, at 38.

83. *See* Kilb, *supra* note 52, at 815; *see also Why has Inter Milan been sold to Thohir?*, NEWSTALK (Oct. 16. 2013), http://www.newstalk.com/Why-has-Inter-Milan-been-sold-to-Thohir [https://perma.cc/3WZG-662C].

84. *See* Kilb, *supra* note 52, at 815; *see also* UEFA, CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS annex X (2015), *available at* https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf [https://perma.cc/UKP6-8EN9] [hereinafter UEFA CLUB LICENSING].

6. To protect the long-term viability and sustainability of European club football.[85]

C. Relevant Financial Fair Play Regulations

1. Applicability, Disclosure Requirements, and Prohibition of Overdue Payables

Football clubs qualifying for UEFA competitions on sporting merit (i.e., national league success) generally must obtain a license issued by their licensor, a UEFA national association (e.g., the Italian Football Association), in accordance with the national association's licensing regulations.[86] Additionally, each license applicant must confirm that they will abide by and observe the UEFA Club Licensing and Financial Fair Play Regulations.[87] Applicants must also authorize UEFA to examine relevant documents and execute compliance audits.[88]

In the pursuit of transparency, UEFA also requires the release of the identity of any party that has a direct or indirect controlling position in the license applicant.[89] Any party that has a ten percent or greater direct or indirect ownership, or significant influence of the club must be identified.[90] UEFA defines "significant influence" as the ability to influence but not control financial and operating policy.[91] Moreover, parties are deemed to have significant influence if they provide an amount equivalent to thirty percent or more of the licensee's total revenue in a reporting period.[92] For further financial disclosure, the granting of a license requires the applicant to prepare and submit financial information that demonstrates the club's ability to continue as a going concern until the end of the license season.[93] Such financial information includes a budgeted profit and loss account, statement of cash flow, and explanatory notes regarding significant assumptions.[94]

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85. *See* UEFA CLUB LICENSING, *supra* note 84 art. 2.
86. *See* UEFA CLUB LICENSING, *supra* note 84, art. 14.
87. *See* UEFA CLUB LICENSING, *supra* note 84, art. 43.
88. *See* UEFA CLUB LICENSING, *supra* note 84, art. 43
89. *See* UEFA CLUB LICENSING, *supra* note 84, art. 46.
90. *See* UEFA CLUB LICENSING, *supra* note 84, art. 46
91. *See* UEFA CLUB LICENSING, *supra* note 84, art. 13.
92. *See* UEFA CLUB LICENSING, *supra* note 84, art. 13.
93. *See* UEFA CLUB LICENSING, *supra* note 84, art. 52.
94. *See* UEFA CLUB LICENSING, *supra* note 84, art. 52.

One column of FFP is represented through Articles 49 to 50b, which prohibits clubs from having overdue payables.[95] Article 49 prohibits football clubs from having overdue payables towards other football clubs as a result of a player transfer.[96] Here, payables are defined to include the amounts due to football clubs for players' rights, training compensation, and other payments contracted between the clubs.[97] A payable is considered overdue if it is not paid according to the agreed terms between the clubs.[98] The license applicant must also prove that it has no overdue payables to its employees, such as wages, salaries, image rights, bonuses, and other benefits.[99] Finally, UEFA also requires that the applicant must prove that it has no overdue payables towards social or tax authorities resulting from a contractual or legal obligation.[100] Such regulations were the fulcrum for UEFA's denial of Italian Club Parma's license application.[101]

2. The Break-Even Requirement

The second, more controversial column of FFP is Article 58's break-even requirement.[102] The break-even rule prohibits clubs from incurring "relevant expenses" greater than their "relevant income."[103] In other words, clubs cannot spend more than they make. The break-even analysis measures the difference between relevant income and relevant expenses over three-year intervals.[104] For example, in determining a club's compliance with the break-even requirement for a UEFA competition that commences in 2018 and ends in 2019, a club's annual income and expenses for the reporting periods ending in

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95. *See* UEFA CLUB LICENSING, *supra* note 84, arts. 49-50b.
96. *See* UEFA CLUB LICENSING, *supra* note 84, art. 49.
97. *See* UEFA CLUB LICENSING, *supra* note 84, art. 49.
98. *See* UEFA CLUB LICENSING, *supra* note 84, annex VIII.
99. *See* UEFA CLUB LICENSING, *supra* note 84, art. 50.
100. *See* UEFA CLUB LICENSING, *supra* note 84, art. 50(b).
101. *See* Myfanwy Garman, *Parma denied UEFA licence*, GOAL, http://www.goal.com/en-sg/news/3951/europa-league/2014/05/21/4830716/parma-denied-uefa-licence [https://perma.cc/3DL7-EYQQ] (last visited Feb. 13, 2019); *see also* Ben Gladwell, *Parma declared bankrupt, face relegation to amateur leagues*, ESPN (Jun. 22. 2015), http://www.espn.com/soccer/parma/story/2500817/parma-declared-bankrupt-will-be-relegated-to-amateur-leagues [https://perma.cc/R2DR-7H8L].
102. UEFA CLUB LICENSING, *supra* note 84, art. 58.
103. *See* UEFA CLUB LICENSING, *supra* note 84, art. 58.
104. *See* UEFA CLUB LICENSING, *supra* note 84, art. 58.

2018, 2017, and 2016 will be evaluated.[105] For a UEFA competition that commences the following year, 2019, the CFCB will evaluate the club's annual income and expenses for the reporting periods ending in 2019, 2018, and 2017.[106] In evaluating clubs' relevant income and expenses over the relevant periods, FFP provides an acceptable deficit for compliance with the break-even requirement.[107] The acceptable deficit is EU€5 million but can exceed this level up to EU€30 million if such excess spending is entirely covered by contributions from equity participants or related parties.[108]

"Relevant income" includes gate receipts, sponsorship and advertising income, broadcasting rights, commercial activities, tournament prize money, other operating income (e.g., membership fees), and profits from player sales.[109] However, UEFA requires that relevant income be adjusted (decreased) if any of these items include income generating transactions with related parties above fair value.[110]

"Relevant expenses" are defined as the sum of the cost of sales or material, employee benefit expenses, and the costs of acquiring player registration.[111] Relevant expenses must be adjusted (increased) if any expense transaction with related parties is below fair value.[112] Such transactions include any expense transaction where a related party's goods and services are provided to the licensee or where employee benefit expenses (e.g., player wages and costs) are incurred by a related party despite the employee participating in club activities.[113] However, relevant expenses may be decreased if any of the listed expenses include spending on youth development, community development activities, or finance costs attributable to the construction or substantial modification of tangible fixed assets.[114]

Permitted contributions from equity partners include their payments for shares from the club's share reserve accounts.[115]

105. *See generally* UEFA CLUB LICENSING, *supra* note 84, art. 59.
106. *See generally* UEFA CLUB LICENSING, *supra* note 84, art. 59.
107. *See* UEFA CLUB LICENSING, *supra* note 84, art. 61.
108. *See* UEFA CLUB LICENSING, *supra* note 84, art. 61.
109. UEFA CLUB LICENSING, *supra* note 84, annex X.
110. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
111. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
112. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
113. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
114. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
115. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.

Permitted contributions from a related party include capital received as an unconditional gift made to the club with no obligation of repayment or any other form of consideration from the club.[116] An example of a permitted related party contribution is a waiver of a debt owed to a related party.[117] Another example of a permitted related party contribution is the *difference* between the reported value of a related party transaction and the estimated fair value of the transaction.[118] These contributions from equity partners and related parties are only permitted to fund a deficit that is EU€30 million or less.[119] However, these contributions are excluded from "relevant income" in the initial break-even calculation.[120] The break-even requirement is not met if the club has an aggregate break-even deficit exceeding EU€30 million, regardless of any contribution from related parties or equity partners.[121]

3. Related Party Transactions

UEFA's required adjustment for related party transactions is a direct response to clubs' past dependence on wealthy benefactors and a result of UEFA's focus on limiting such dependence.[122] Therefore, it seems appropriate to break down UEFA's related party provisions. A related party is defined as a person or entity that is related to the licensee (the football club).[123] When determining whether the party is related to the licensee, the focus is not solely on the legal relationship but "the substance of the relationship."[124] A *person* is considered related to the club if that person has "control or joint control" over the club, has "significant influence" on the club, or is a "key management" member of the club or the club's parent entity.[125] Additionally, close members of that person's family are also considered related to the

116. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
117. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
118. *See* UEFA CLUB LICENSING, *supra* note 84, annex X (emphasis added).
119. *See* UEFA CLUB LICENSING, *supra* note 84, art. 61, annex X.
120. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
121. *See* UEFA CLUB LICENSING, *supra* note 84, art. 61, 63.
122. *See* Christopher A. Flannagan, *A Tricky European Fixture: An Assessment of UEFA's Financial Fair Play Regulations and Their Compatibility with EU Law*, 13 INT'L SPORTS L.J. 148, 150 (2013); *see also* Kilb *supra* note 52, at 815-16; Egon Franck & Markus Lang, *A Theoretical Analysis of the Influence of Money Injections on Risk Taking in Football Clubs*, 61 SCOT. J. POL. ECON. 430, 438 (2014).
123. UEFA CLUB LICENSING, *supra* note 84, annex X.
124. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
125. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.

football club under FFP.[126] Annex X provides that close members of that person's family are considered to be "those family members who may be expected to influence, or be influenced by, that person in his dealings with the entity, including that person's children and spouse or domestic partner, children of that person's spouse or domestic partner, and dependents of that person or that person's spouse or domestic partner."[127] An *entity* is related to the club if the entity and club are "members of the same group" (like in a parent to subsidiary relationship or subsidiary to subsidiary relationship), the entity has significant influence over the club, the entity and the club are controlled, jointly controlled, or significantly influenced by the same government, or the entity is controlled by a related person of the club as previously defined.[128] Furthermore, the entity is deemed to be related if the entity and the club are controlled or jointly controlled, or significantly influenced by the same government.[129]

A related party transaction is defined as a "transfer of resources, services, or obligations between related parties, regardless of whether the price has been charged."[130] "Fair value" for a transaction is defined as the amount for which an "asset could be exchanged or a liability settled, between knowledgeable willing parties in an *arm's length negotiation*."[131] When such related party transactions occur, the club must submit its determination of its fair value.[132] In situations where the fair value of the related party transaction is investigated by the CFCB, an independent third party assessor will perform a fair value assessment of the transaction under standard market practices and assign a fair value to the related party transaction.[133] Where the CFCB's estimated fair value is different than the club's proposed value, the relevant income or expense must be adjusted to represent the value estimated by the CFCB.[134] UEFA has identified common examples of related party transactions: revenue from sponsorship arrangements, revenue from hospitality tickets or use of executive boxes, and

126. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
127. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
128. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
129. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
130. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
131. *See* UEFA CLUB LICENSING, *supra* note 84, annex X (emphasis added).
132. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
133. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.
134. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.

transactions with a related party where goods or services are provided by the club.[135]

IV. SUPPORT FOR FINANCIAL FAIR PLAY

A. Financial Arguments in Favor of FFP

There are three prominent arguments in support of FFP's restrictions on clubs' spending and owners' capital injections.[136] First, eliminating potential bailouts from wealthy owners makes clubs more risk averse because they do not have the backstop of a sugar daddy cash infusion.[137] This leads to more cautious investments and more in-depth evaluations of players before making a purchase.[138] FFP also reduces the risk of other club managers following suit in an attempt to better compete against teams that are lavishly spending.[139] Consequently, by limiting the security blanket that equity partner investments and related party transactions provide, club managers will act more responsibly, and the risk of compounding financial imprudence from other managers following suit is prevented.

Second, FFP's handcuffing of rich benefactors from directly injecting capital incentivizes investment in stadiums, infrastructure, and youth community development.[140] FFP incentivizes wealthy owners to invest in such projects because the future revenue generated from such investments are permissible forms of revenue under the break-even requirement.[141] Moreover, the expenses that a club incurs in developing such projects are not included on the expense side of the analysis.[142] These investments produce real assets that ensure the clubs' longevity. As a result, it converts the potentially volatile income

135. *See* UEFA CLUB LICENSING, *supra* note 84, annex X.

136. Kilb, *supra* note 52, at 815; Franck & Lang, *supra* note 123, at 438.

137. *See* Kilb, *supra* note 52, at 815; *see also* UEFA CLUB LICENSING, *supra* note 84, annex X.

138. Kilb, *supra* note 52, at 815; Franck & Lang, *supra* note 123, at 438.

139. Kilb, *supra* note 52, at 815.

140. *See* Kilb, *supra* note 52, at 815.

141. *See* Kilb, *supra* note 52, at 815; *see also* UEFA CLUB LICENSING, *supra* note 84, annex X.

142. *See* UEFA CLUB LICENSING, *supra* note 84, annex X; *see also* Kilb, *supra* note 52, at 815; *see also* Franck & Lang, *supra* note 123, at 438.

from the benefactor into stable and more dependable income from real assets.[143]

Third, by incentivizing such investments and blocking direct owner investment, FFP forces owners to gain "the aura of being 'virtuous owners'" in the eyes of the consumers because they are incentivized to invest into the surrounding community.[144] Teams that establish this aura will likely see a jump in fan approval, which leads to greater fan turnout, viewership, and ultimately, revenue.[145]

B. Political Support for UEFA

In 2009, the European Commission highlighted that a licensing system, like UEFA's FFP, may be viewed as necessary for the functioning of the European sports model and that the primary aim of the financial criteria for licensing regulatory programs is to ensure the viability of clubs within sporting competitions.[146] In 2011, the European Commission expressly stated that legitimate objectives of sport regulatory organizations include the procurement of financial stability of sports clubs.[147] UEFA also prudently sought counsel from the European Commission as the regulations were being developed.[148] Andrea Traverso, then Head of Club Licensing and Financial Fair Play, confirmed that UEFA had a series of consultations with the European Commission to ensure that FFP complied with EU law.[149] In 2012, the European Commission issued a joint statement with UEFA supporting FFP.[150] In their joint statement, they stated that FFP's objective was

143. Kilb, *supra* note 52, at 815; *see also* Franck & Lang, *supra* note 123, at 438.

144. *See* Kilb, *supra* note 52, at 815; *see also* UEFA CLUB LICENSING, *supra* note 84, annex X.

145. Kilb, *supra* note 52, at 815–16.

146. Stefano Bastianon, *The Striani Challenge to UEFA Financial Fair-Play. A New Era After Bosman or Just a Washout?*, 11 COMPETITION L. REV 7, 29 (2015).

147. *See id*. at 29-30.

148. Neil Dunbar, *The Union of European Football Association's Club Licensing and Financial Fair Play Regulations - Are They Working*?, SPORTS L. E.J. at 6 (Aug. 19. 2015), https://slej.scholasticahq.com/article/6412-the-union-of-european-football-association-s-club-licensing-and-financial-fair-play-regulations-are-they-working [https://perma.cc/A4PJ-XLFX].

149. Daniel Geey, *The UEFA Financial Fair Play Rules: A Difficult Balancing Act*, 9 E.S.L.J. 50, 60 (2011).

150. Kaplan, *supra* note 4; Joint Statement by Vice-President Joaquin Almunia and President Michel Platini (Mar. 21, 2012), *available at* http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf [https://perma.cc/UR9Y-KZ5R]; Letter from Michel Platini, President, UEFA to Joaquin Almunia,Vice-President, European Commission (Mar. 21,

ensuring that football clubs stand on their own by implementing sound corporate governance methods.[151] In 2014, European Commissioner, Androulla Vassiliou, strongly supported FFP because it improved transparency and governance standards.[152] On April 3, 2014, Vice President of the European Commission and the Commissioner for Competition, Joaquín Almunia, reaffirmed his support for FFP, citing its objective to safeguard the financial health of European football.[153] However, the joint statement only mentions how FFP furthers the European Union's policy in the field of state aid and does not address FFP's competition law issues.[154] The following October, UEFA and the European Commission entered into a formal "Arrangement for Cooperation" for a term of three years.[155] Paragraph 2.7 of the cooperative agreement stated that the regulations "contribute to the sustainable development and healthy growth of sport in Europe."[156] The cooperative agreement was renewed and signed in February 2018, and was intended to build upon the previous agreement.[157]

C. Effectiveness of the Regulations on Financial Management

According to a 2015 UEFA study, net football club debt fell from sixty-five percent of revenue in 2009 to forty percent of revenue in 2015.[158] The study also showed that combined bottom-line losses

2012), *available at* http://www.uefa.org/MultimediaFiles/Download/uefaorg/EuropeanUnion/01/77/21/75/1772175_DOWNLOAD.pdf [https://perma.cc/VQ37-85K8].

151. Dunbar, *supra* note 148, at 6; *Commissioner Almunia reaffirms financial fair play support*, UEFA (Apr. 3. 2014), https://www.uefa.com/insideuefa/protecting-the-game/club-licensing-and-financial-fair-play/news/newsid=2083789.html [https://perma.cc/6ZMJ-KWFK] [hereinafter *Almunia Reaffirmation*].

152. Tom Serby, *The State of EU Sports Law: Lessons from UEFA's 'Financial Fair Play' Regulations*, 16 INT'L SPORTS L.J. 37, 38 (2016).

153. *See* Dunbar, *supra* note 148, at 6; *see also Joaquín Almunia*, EUROPEAN COMM'N, http://ec.europa.eu/archives/commission_2010-2014/almunia/about/cv/index_en.htm [https://perma.cc/6RC6-6A8Q] (last visited Feb. 13, 2019).

154. Kaplan, *supra* note 4.

155. Dunbar, *supra* note 148, at 6.

156. Dunbar, *supra* note 148, at 6 (internal quotation marks omitted).

157. Press Release, European Commission, European Commission and UEFA Consolidate Cooperation (Feb. 21, 2018), *available at* http://europa.eu/rapid/press-release_IP-18-901_en.htm [https://perma.cc/E9UJ-AFRX].

158. UEFA, CLUB LICENSING BENCHMARKING REPORT 119 (2015), *available at* https://es.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/42/27/91/2422791_DOWNLOAD.pdf [https://perma.cc/CVM3-XSJF] [hereinafter 2015 UEFA CLUB BENCHMARKING].

decreased 81% since the introduction of FFP.[159] Clubs also experienced operating profits of EU€1.5 billion in the two years prior to the study, which is a dramatic turnaround when compared to the EU€700 million losses in the two years prior to FFP's introduction.[160] Deloitte reported that the 2013-14 season's overall wages to revenue ratio fell to fifty-nine percent across the five largest leagues.[161] This was its lowest level since 1999-2000.[162] Since the implementation of FFP, European clubs' revenues increased 6% in 2013, 6% in 2014, and 9.5% from 2015 to 2016.[163] This has largely been spurred by an increase in television and broadcasting revenues.[164] There has also been an increase in revenue from UEFA club competitions.[165] The large clubs have also experienced more sponsorship and commercial revenue.[166]

Clubs have also incurred wage growth of approximately 8.6% from 2015-2016.[167] Note that this figure is below the 2015-2016 revenue growth rate of 9.5%, indicating that clubs are being financially prudent.[168] A key financial indicator of the health of football clubs, according to UEFA, is the wage to revenue ratio.[169] Per UEFA reports, this ratio decreased from 63% to 62.5% from 2015 to 2016.[170] Over the six-year span from 2010 to 2016, the ratio was at a peak of 65.2% in 2012, but declined to 62.1% in 2014, and has remained below 63.5% in 2015 and 2016..[171] Nevertheless, wages have increased approximately 40% from EU€8.2 billion in 2010 to EU€11.5 billion in

159. *See id*. at 106.

160. *See id*.

161. Serby, *supra* note 152, at 43; DELOITTE, DELOITTE ANNUAL REVIEW OF FOOTBALL FINANCE 2015 9 (2015), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-arff-2015-highlights.pdf [https://perma.cc/B6YJ-YZHL].

162. Serby, *supra* note 152, at 43; ; DELOITTE, DELOITTE ANNUAL REVIEW OF FOOTBALL FINANCE , *supra* note 161, at 9.

163. UEFA, CLUB LICENSING BENCHMARKING REPORT 62 (2016), *available at* https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Clublicensing/02/53/00/22/2530022_DOWNLOAD.pdf [https://perma.cc/CVM3-XSJF] [hereinafter 2016 UEFA CLUB BENCHMARKING].

164. *See id*. at 64

165. *See id*. at 68.

166. *See id*. at 73-75.

167. *See id*. at 81.

168. *See id*.

169. *See id*. at 82.

170. *See id*.

171. *See id*.

2016.[172] Additionally, club operating costs, excluding wages, have increased at a record eight percent among the top twenty clubs in 2016.[173] This supports the conclusion that FFP is helping clubs focus their spending away from players and towards expanding their brand, improving future revenue streams.[174] Finally, in regard to overall club profitability, clubs in 2016 experienced a record aggregate operating profit of EU€832 million before including transfer costs.[175] Approximately half of the top-division leagues reported aggregate bottom line profits in 2016.[176] After transfer costs have been included, combined bottom-line losses have decreased by eighty-four percent since the introduction of FFP in 2011.[177] In 2010, bottom line losses were approximately EU€1.6 billion.[178] In 2016, the bottom line losses were EU€262 million.[179] Such improvement has been largely driven by improved club operating profits.[180] 2016 Club operating profits reached a record of EU€832 million.[181] In the three year period from 2014 to 2016 clubs earned operating profits of EU€2.3, which is a dramatic difference from the approximately EU€800 million earned from 2010 to 2012 These metrics show that FFP has improved football club efficiency and independence. With improved operating profits, clubs will be able to continue independently financing their operations while also participating in the transfer market.[182]

FFP also had a positive impact on football clubs' balance sheets. Club investments in stadiums and other fixed assets exceeded EU€1 billion for the first time on record.[183] These figures stem from the record level of stadium investment in 2016.[184] Furthermore, there is still room for more investment as only twenty percent of European clubs own the stadiums they play in.[185] Recall that FFP provides that

172. *See id*. at 83.
173. *See id*. at 91
174. *See id*. at 91.
175. *See id*. at 100.
176. *See id*.
177. *See id*.
178. *See id*. at 102.
179. *See id*.
180. *See id* at 101.
181. *See id*.
182. *See id*. at 108.
183. *See id*. at 113.
184. *See id*. at 117.
185. *See id*. at 115.

such investments are not included as relevant expenses in the break-even analysis.[186] Such figures support the proposition that FFP incentivizes investments that procure future revenue, which in turn ensures the viability of football clubs.[187] The record number of investment in fixed assets evidences that FFP's incentive structure is effective.[188]

One of the most encouraging signals is the decline in football clubs' net debt.[189] UEFA defines net debt as the sum of net borrowing (i.e., bank overdrafts, loans, and accounts payable) and net player transfer balance (i.e., the net account receivable and payable from player transfers).[190] From 2010 to 2016, the combined net debt of Europe's top division clubs decreased from sixty percent of revenue to thirty-five percent of revenue.[191] Since FFP's introduction, clubs' net assets (assets less liabilities) have doubled.[192] This doubling is a direct result of FFP's limitations on spending and incentives for investment in fixed assets.[193]

V. FINANCIAL FAIR PLAY FLAWS

A. Anti-Competition Legal Claims

The major anti-competition claim against UEFA is argued under Article 101 of Treaty on the Functioning of the European Union ("TFEU"), which was formerly known as Article 81 of the Treaty Establishing the European Community ("EC Treaty").[194] UEFA is the only organization establishing European-wide football competitions.[195] Thus, it dominates the European football market which creates the

186. UEFA CLUB LICENSING, *supra* note 85, annex X.
187. Kilb, *supra* note 52, at 815.
188. 2016 UEFA Club Benchmarking, *supra* note 163, at 113.
189. *See* 2016 UEFA Club Benchmarking, *supra* note 163, at 113.
190. *See* 2016 UEFA Club Benchmarking, *supra* note 163, at 121.
191. *See* 2016 UEFA Club Benchmarking, *supra* note 163, at 121
192. *See* 2016 UEFA Club Benchmarking, *supra* note 163, at 124.
193. *See* 2016 UEFA Club Benchmarking, *supra* note 163, at 124.
194. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 88, [hereinafter TFEU]; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 81, Dec. 7, 2007, 2007 O.J. (C 306) 1 (as in effect 2009) (now TFEU art. 101) [hereinafter EC Treaty].
195. Kaplan, *supra* note 4.

opportunity for FFP to be challenged under either Article 101(1).[196] Article 101(1) states that European competition law prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[197] Article 101(1) specifically prohibits agreements that directly or indirectly fix prices or trading conditions, or agreements that limit or controls production, markets, technical development, or investment.[198] The legal claims generally argue that FFP's financial constraints violate Article 101(1)(a), which prohibits direct or indirect fixing of purchasing or selling prices, or Article 101(1)(b) which prohibits agreements or decisions that limit investment.[199]

Studies support the contention that FFP's break-even requirement protects the large and established pre-FFP clubs and can be considered a barrier to entry for smaller clubs because of its limitations on investment.[200] FFP has unsurprisingly garnered support from Europe's largest clubs.[201] It is noteworthy the fact that these larger clubs have tremendous political and financial leverage.[202] The large clubs threatened to break away from UEFA and form their own super league.[203] UEFA would be unable to prevent clubs or players from joining such a competition under Article 102 of the TFEU.[204] Lack of participation from Europe's elite clubs would presumably cause a decrease in UEFA's viewership and revenue and consequently, its dissolution.[205]

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196. *See id* at 799; *Antitrust Overview,* EUR. COMM'N (Aug. 16, 2012) http://ec.europa.eu/competition/antitrust/overview_en.html [https://perma.cc/94XK-P2T9].
197. Kaplan, *supra* note 4, at 799; TFEU *supra* note 194, art. 101.
198. TFEU, *supra* note 194, art. 101.
199. Serby, *supra* note 152, at 44.
200. Serby, *supra* note 152, at 44.
201. Jean-Louis Dupont, *Football's Anticompetitive Streak*, WALL ST. J. (Mar. 25, 2013), https://www.wsj.com/articles/SB10001424127887324077704578357992271428024 [https://perma.cc/9UQ7-VCGK].
202. *See id*.
203. Serby, *supra* note 152, at 44.
204. *See* Serby, *supra* note 152, at 44.
205. *See* Serby, *supra* note 152, at 44.

1. Past Anti-Competition Claims

In 2013, Jean-Louis Dupont filed two complaints on behalf of player-agent Daniel Striani.[206] One complaint was filed with the European Commission requesting an investigation into UEFA's break-even requirement, and a second complaint was filed with the Brussels Court of First Instance arguing that FFP, in particular the break-even requirement, restricted competition.[207] Specifically, Dupont argued that FFP restricted investment, reduced the number of transfers, and reinforced the current market structure.[208] FFP fortifies the current market structure, he argued, because the break-even rules do not have any exceptions for clubs that are smaller, less established, and compete in the less prestigious and lucrative national leagues (i.e., leagues outside of Spain, England, Germany, Italy, France, and Portugal).[209] The smaller clubs are hit harder than the larger clubs because they are restricted from investing in their long-term success.[210] In other words, FFP causes small clubs to remain small and protects the large established clubs from new competition.[211] Dupont claimed that due to its breach of EU competition law, UEFA must prove that FFP serves a legitimate and necessary objective and that they are the least restrictive means of achieving its goals under *Meca-Medina v. Commission* and *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*.[212] This is similar to constitutional strict scrutiny applied in the United States.[213] Unfortunately, EU courts have failed to decide on the merits of such challenges.[214]

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206. *See* Serby, *supra* note 152, at 38; Dupont, *supra* note 201; *see also* Bastianon, *supra* note 146, at 17.

207. *See* Bastianon, *supra* note 146, at 8.

208. Serby, *supra* note 152, at 38; *see also* Dupont, *supra* note 201.

209. Dupont, *supra* note 201.

210. *See* Dupont, *supra* note 201.

211. *See* Dupont, *supra* note 201.

212. *See* Dupont, *supra* note 201.; *see also* C-519/04, Meca-Medina v. Comm'n, 2006 E.C.R. I-7006; C-309/99, J.C.J. Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577.

213. *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (applying strict scrutiny).

214. *See generally* Ben Van Rompuy, *The Brussels Court judgment on Financial Fair Play: a futile attempt to pull off a Bosman.*, ASSER INT'L SPORTS L. BLOG (Jul. 6, 2015), http://www.asser.nl/SportsLaw/Blog/post/the-brussels-court-judgment-on-financial-fair-play-a-futile-attempt-to-pull-off-a-bosman-by-ben-van-rompuy [https://perma.cc/A433-2NEJ]; *see also* Galatasaray v. UEFA, CAS 2016/A/4492, ¶ 80 (2016). In *Galatasaray*, the Court of Arbitration for Sport decided on such claims in applying Article 101. However, this is not a EU court. *See generally Galatasaray,* CAS 2016/A/4492.

The European Commission was not obligated to carry out the requested investigation.[215] Given the European Commission's past political support for FFP in stating that the regulations are consistent "with the aims and objectives of EU policy in the field of State Aid," a finding against UEFA would likely have caused political embarrassment.[216] In 2014, pursuant to Article 7(1) of Commission Regulation 773/2004,[217] the European Commission issued a letter stating its intention to reject the claim because the case was ongoing in the Brussels court.[218] The European Commission listed three procedural reasons for the rejection.[219] First, the European Commission stated that Striani lacked standing to lodge the complaint as only legal persons, who can demonstrate that they are "directly and adversely affected" by the claimed infringement, can issue a complaint.[220] Second, the European Commission reasoned that Striani, because of his filing in the Brussels Court of First Instance, could secure requested protection before a national court.[221] Third, the European Commission posited that it had only received one complaint regarding FFP.[222] In response, Dupont argued that the first and third reasons for rejection were baseless because FFP directly affected player agents due to a decline in transfers and, in response to the third justification, submitted three other complaints against FFP.[223] However, in October 2014, the European Commission formally rejected the complaint solely on its second justification, finding that the Brussels Court of First Instance was "well-placed" to deal with the complaint, and sufficiently defend Striani's rights.[224] The European Commission's decision left the

215. *See* Van Rompuy, *supra* note 214.

216. *See* Van Rompuy, *supra* note 214.

217. Commission Regulation 773/2004 of Apr. 7, 2004, Relating to the Conduct of Proceeding by the Commission Pursuant to Articles 81 and 82 of the EC Treaty, 2004 O.J. (L 123) 18, 7.

218. Serby, *supra* note 152, at 38; *see also Case AT.40105 UEFA Financial Fair Play* Rules, EUR. COMM'N (Oct. 24, 2014), http://ec.europa.eu/competition/antitrust/cases/dec_docs/40105/40105_220_6.pdf [https://perma.cc/DBH9-RH6F].

219. Van Rompuy, *supra* note 214.

220. *See* Van Rompuy, *supra* note 214.; Bastianon, *supra* note 146 at 18-19.

221. *See* Van Rompuy, *supra* note 214; *See* Bastianon, *supra* note 146 at 18-19.

222. *See* Van Rompuy, *supra* note 214.

223. *See* Van Rompuy, *supra* note 214; Bastianon, *supra* note 146 at 18-19.

224. *See* Van Rompuy, *supra* note 214; Bastianon, *supra* note 146 at 25.

Brussels Court of First Instance as the only remaining avenue for a decision on the merits.[225]

In 2015, the Brussels Court of First Instance declared itself "incompetent" to deal with the complaint because it lacked jurisdiction.[226] Specifically, because UEFA is an association listed in the register of companies under Articles 60 and 61 of the Swiss Civil Code, it is a legal person under Swiss law.[227] Therefore, the proper jurisdiction for the claim was Switzerland because persons domiciled in a State bound by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention") (i.e., Switzerland) can only be sued in the courts of that State.[228] Also, the Brussels Court held that it was not possible to invoke Article 5(3) of the Lugano Convention, which permits tort claims to be brought in the place where the harm occurred (i.e., Belgium), because the addressees of FFP are only the clubs, not player agents.[229] Consequently, Striani's incurred harm was considered indirect and too attenuated to fall under Article 5(3) of the Lugano Convention.[230]

The Brussels Court of First Instance, however, submitted the question of whether the FFP regulations violated Articles 101 to the Court of Justice of the European Union ("CJEU") for a preliminary ruling.[231] The court also imposed an interim order to prevent the

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225. *See generally* Van Rompuy, *supra* note 214; Bastianon, *supra* note 146 at 25.

226. *See generally* Van Rompuy, *supra* note 214; Bastianon, *supra* note 146, at 26; Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civil [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210, arts. 60-61 (Switz.), *available at* https://www.admin.ch/opc/en/classified-compilation/19070042/index.html#id-ni2-ni6-ni8 [https://perma.cc/LJ3V-A642] [hereinafter Swiss Civil Code].

227. Bastianon, *supra* note 146, at 26; Swiss Civil Code, *supra* note 226, arts. 60-61.

228. Bastianon, *supra* note 146, at 26; Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Switz.-Eur., art. 3, Dec. 21, 2007, 2007 O.J. (L 339) art. 3 [hereinafter Convention on Jurisdiction] *supra* note 227. Article 3 of the Convention on Jurisdiction states that "Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title." The reason why Switzerland was the appropriate jurisdiction for this claim was because the claim did not fall into the exceptions (in Sections 2-6) to this general rule that the claim must be filed in the state in which the defendant is domiciled which is in Section 1 of Article 3 of the Convention on Jurisdiction. *See* Convention on Jurisdiction, *supra* note 228, art. 3.

229. *See* Bastianon, *supra* note 146, at 26.

230. *See* Bastianon, *supra* note 146, at 26.

231. Serby, *supra* note 152, at 38; *see also* TFEU, *supra* note 194, art. 101.

implementation of the second phase of FFP, where the acceptable deficit would be reduced from EU€45 million to EU€30 million, until the CJEU delivered an opinion on the submitted question.[232] The court issued the interim order under Article 31 of the Lugano Convention, which allows the claimant to apply for provisional and protective measures that may be available under the law of the state of the present court (i.e., Belgium) even if under the Lugano Convention another state would have jurisdiction as to the substance of the matter (i.e., Switzerland).[233] The reference to the CJEU seemed unlikely to merit a decision because Article 267 of the TFEU states that a Member State may submit an issue for a preliminary ruling only in cases where the CJEU's adjudication would be necessary for the presiding court to make a judgement on the case.[234] However, the presiding court, the Brussels Court of First Instance, had already concluded that it was incompetent to give a judgment on the merits of the case because of lack of jurisdiction.[235] Thus, a CJEU preliminary ruling would not have been "necessary," (as required under Article 267), for the presiding court to provide a judgement because the presiding court did not have the jurisdictional authority to provide a judgement.[236] As expected, the CJEU rejected the reference citing the Brussel's court lack of international jurisdiction and other factors making such a preliminary decision pointless.[237]

To summarize, the European Commission dismissed the complaint on procedural grounds and the CJEU declined to provide a preliminary ruling.[238] Essentially, there has not been an EU court decision on whether FFP complies with the Article 101.[239] However, the Court of Arbitration for Sport ("CAS") has applied Article 101 to FFP and found that FFP was not in violation.[240] Nevertheless, the possibility remains that FFP could be challenged under Article 101 by

232. *See* Bastianon, *supra* note 146, at 26-27; *see also* Van Rompuy, *supra* note 214.
233. Bastianon, *supra* note 146, at 26.
234. *See* Bastianon, *supra* note 146, at 26; *see also* TFEU, *supra* note 194, art. 267, at 164.
235. Bastianon, *supra* note 146, at 26-27.
236. *See* Bastianon, *supra* note 146, at 26-27; *see also* TFEU, *supra* note 194, art. 267.
237. Bastianon, *supra* note 146, at 27.
238. *See* Bastianon, *supra* note 146, at 25-27.
239. *See* Bastianon, *supra* note 146, at 27; *see generally* Serby, *supra* note 152, at 48-49; *see also* Geoff Pearson*, Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System*, 21 EUR. L. J. 220, 231 (2015). *But see* Galatasaray v. UEFA, CAS 2016/A/4492 (2016).
240. *See Galatasaray*, CAS 2016/A/4492, at ¶ 80.

PSG and that such a challenge would garner a decision on the merits from the CJEU.[241]

2. UEFA's Adjustment

After the initial promulgation of FFP and subsequent legal challenges, UEFA revised FFP.[242] Though the challenges to various aspects of FFP were largely ineffective, the rules were eased to allow for more equity input by owners.[243] Additionally, UEFA also added the option for clubs to enter into Settlement Agreements and Voluntary Agreements, which typically result in less stringent consequences for clubs who violate, or will violate, FFP's break-even requirement.[244]

A club can enter a Voluntary Agreement when it has undergone a significant change in ownership or control within twelve months preceding the application deadline.[245] However, a club must not have been party to a Voluntary Agreement or subject to any disciplinary measures within the three reporting periods prior to filing the application.[246] In contrast to the *ex post* nature of Settlement Agreements, Voluntary Agreements are *ex ante* agreements that allow clubs to deviate from FFP standards with the ultimate aim of complying with the break-even requirement in the future.[247] Voluntary Agreements are defined as being "a structured set of obligations which are individually tailored to the situation of the club." [248] Such agreements include an eventual break-even target (typically four years from entering the agreement) and require specific operational results for each reporting period covered by the agreement.[249] The term for a Voluntary Agreements can be up to four reporting periods.[250]

241. *See generally* Serby, *supra* note 152, at 45; Dupont, *supra* note 201.

242. Christopher Flanagan, *The Evolution of UEFA's Financial Fair Play Rules – Part 2: The Legal Challenges*, ASSER INT'L SPORTS L. BLOG (Sep. 27, 2017), http://www.asser.nl/SportsLaw/Blog/post/the-evolution-of-uefa-s-financial-fair-play-rules-part-2-the-legal-challenges-by-christopher-flanagan [https://perma.cc/Y87U-AMD5].

243. *See id.*

244. *See id*.

245. UEFA CLUB LICENSING, *supra* note 85, annex XII.

246. *See* UEFA CLUB LICENSING, *supra* note 85, annex XII.

247. Flanagan, *supra* note 242.

248. *See* Flanagan, *supra* note 242.

249. *See* Flanagan, *supra* note 242.

250. *See* Flanagan, *supra* note 242.

To enter into a Voluntary Agreement, an application must be submitted before December 31 of the preceding license season in which the agreement would come into force.[251] Moreover, the applying club must submit a long-term future business plan consisting of a balance sheet, profit and loss statement, and statement of cash flows.[252] The projections for such statements must be based on "reasonable and conservative assumptions" and include future break-even information up to the fourth year after the agreement would come into effect.[253] Lastly, the application must also demonstrate the club's ability to continue as a going concern until at least the end of the agreement period.[254] For further security, UEFA has stipulated that in order for a club to enter into a Voluntary Agreement, the agreement must include "an irrevocable commitment(s) by an equity participant(s) and related party(ies) to make contributions for an amount at least equal to the aggregate future break-even deficits for all the reporting periods covered by the Voluntary Agreement."[255] After the club submits it's application, it must demonstrate its capacity to meet its stated targets.[256]Subsequently, the CFCB investigatory chamber reviews each application and, if accepted, monitors the proper and timely implementation of the Voluntary Agreement.[257] An example of the application process is CFCB's denial of AC Milan's ("Milan") application for a Voluntary Agreement. Milan is one of Italy's largest and most prestigious football clubs.[258] Milan underwent an ownership change eight months earlier.[259] CFCB denied Milan's Voluntary Agreement citing the "uncertainties in relation to the refinancing of the

251. UEFA CLUB LICENSING, *supra* note 85, annex XII.

252. *See* UEFA CLUB LICENSING, *supra* note 85, annex XII.

253. *See* UEFA CLUB LICENSING, *supra* note 85, annex XII; *see also* Flanagan, *supra* note 242.

254. UEFA CLUB LICENSING, *supra* note 85, annex XII.

255. Flanagan, *supra* note 242.

256. UEFA CLUB LICENSING, *supra* note 85, annex XII.

257. UEFA CLUB LICENSING, *supra* note 85, annex XII.

258. *History*, UEFA, https://www.uefa.com/uefachampionsleague/history/seasons/ [https://perma.cc/XKL3-PVHT].

259. Robert Smith, *Inter excels in debt play as rival AC Milan struggles*, FIN. TIMES (Dec. 21, 2017), https://www.ft.com/content/d8114654-e651-11e7-97e2-916d4fbac0da [https://perma.cc/HZ7A-ULB4].

loans to be paid back in October 2018 and the financial guarantees provided by the main shareholders."[260]

UEFA also incorporated the "Settlement Agreement."[261] A Settlement Agreement is best described as a plea bargain.[262] Settlement Agreements differ from Voluntary Agreements because they offer less intensive repercussions for clubs *who are deemed in breach* of FFP by the CFCB.[263] Therefore, the major difference between Settlement Agreements and Voluntary Agreements is that Settlement Agreements are made with clubs that the CFCB has already deemed to have failed in their compliance with FFP while Involuntary Agreements are entered into prior to the conclusion of an investigation.[264] Some Settlement Agreements appear to be mere slaps on the wrist. In response, UEFA offered the opportunity of other clubs to challenge the Settlement Agreement of another club if they find that it is not strict enough.[265]

At the conclusion of an investigation, the CFCB investigator has the authority to enter into a Settlement Agreement with the investigated club after consulting with other members of the investigatory chamber.[266] Similar to a Voluntary Agreement, a Settlement Agreement may set out necessary obligations for the club, which may include disciplinary measures.[267] More importantly, the severity of

260. *AC Milan request for voluntary agreement rejected*, UEFA (Dec. 15, 2017), https://www.uefa.com/insideuefa/protecting-the-game/club-licensing-and-financial-fair-play/news/newsid=2526997.html [https://perma.cc/2LW7-ASP7] [hereinafter *Denial of Voluntary Agreement*].

261. Flanagan, *supra* note 242.

262. *See* Flanagan, *supra* note 242; Gabriele Marcotti, *Neymar's record-breaking move: What it means for Barcelona, PSG and more*, ESPN (Aug. 3, 2017), http://www.espn.co.uk/football/blog/marcottis-musings/62/post/3171692/what-neymar-world-record-move-means-for-barcelona-psg-uefa-ffp-more [https://perma.cc/5YZH-GGXF].

263. UEFA, PROCEDURAL RULES GOVERNING THE UEFA CLUB FINANCIAL CONTROL BODY arts. 14-15 (2015), *available at* https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/28/72/46/2287246_DOWNLOAD.pdf [https://perma.cc/5WZB-C8R9] [hereinafter CFCB GOVERNING RULES]; Rossonero, *The differences between the Voluntary Agreement and the Settlement Agreement*, A.C. MILAN INFO (Dec. 9, 2017), https://www.acmilaninfo.com/milan-differences-voluntary-agreement-settlement-agreement/ [https://perma.cc/MB22-6PA8].

264. CFCB GOVERNING RULES, *supra* note 262, arts. 14-15.

265. *See* Marcotti, *supra* note 233; *see also* CFCB GOVERNING RULES, *supra* note 262, arts. 14, 15, 22

266. *See* CFCB GOVERNING RULES, *supra* note 262, art. 14.

267. *See* CFCB GOVERNING RULES, *supra* note 262, art. 15.

future obligations are dependent on the severity of the deficit.[268] An example of a Settlement Agreement application is F.C. Internazionale Milano S.p.A ("Inter"), where the CFCB concluded that Inter failed to meet FFP's break-even requirement during the 2014-15 season because it posted a larger-than-permissible deficit.[269] In the Settlement Agreement, Inter agreed to have a maximum break-even deficit of EU€30 million for the 2016 reporting period and a balanced budget in 2017.[270] Furthermore, given their failure to comply with FFP during the 2014-15 season, Inter was fined EU€20 million, which was withheld from the revenues the club earned from participation in the Europa League.[271] Of that EU€20 million, EU€6 million was to be paid in full regardless of the team's success, and the remaining EU€14 million was conditional upon Inter's future compliance with FFP.[272] Additionally, Inter agreed to a cap on the number of players that could participate in future UEFA club competitions.[273]

The adaptations to FFP described above could be seen as a direct response to the Article 101 challenges and a way of insulating UEFA from future challenges.[274] As discussed in the previous section, the success of UEFA's legal battle will depend on the proportionality of its rules and disciplinary measures in comparison to its objectives.[275] The incorporation of the Settlement and Voluntary Agreements has made FFP more flexible and presumably more proportionate.[276]

3. The Merits of an Article 101 Challenge

Though UEFA has been successful in winning these cases on procedural grounds, the substantive issues have yet to be decided on by an EU court.[277] Consequently, the UEFA's break-even requirement

268. Rossonero, *supra* note 262.
269. UEFA Club Financial Control Body, *Redacted version of the Settlement Agreement with F.C. Internazionale Milano S.p.A. ("the Club")*, http://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/ClubFinancialControl/02/24/67/80/2246780_DOWNLOAD.pdf [https://perma.cc/8K3J-74ZC] (last visited Feb. 15, 2019).
270. *See id*.
271. *See id*.
272. *See id*.
273. *See id*.
274. Flanagan, *supra* note 242.
275. *See* Flanagan, *supra* note 242.
276. *See* Flanagan, *supra* note 242.
277. *See* Flanagan, *supra* note 242.

may again be challenged with anti-competition claims if UEFA seeks to severely sanction Paris Saint Germain for its rampant spending during the 2017 Summer.[278]

The first legal question is whether EU competition law applies to sporting activity. Through its White Paper on Sport, the European Commission stated that while sport brings unique issues, such issues "cannot be construed so as to justify a general exemption from the application of EU law."[279] Moreover, under EU case law, there is no special exception for sporting cases from European Union competition law.[280] The European Court of Justice ("ECJ") held in *Walrave v. Union Cycliste Internationale* that there was no exemption for sport in the application of the laws of the EC Treaty.[281] More specifically, the *Walrave* court held that a professional sport is classified as an economic activity.[282] In 2006, the ECJ applied Articles 101 and 102, then Articles 81 and 82, for the first time, and held in *Meca-Medina* that the mere fact that a rule is purely sporting in nature does not exempt it from EU law.[283] Additionally, the *Meca-Medina* court determined that if there is economic activity, then EU competition law applies.[284] Therefore, challenges against the application of EU law would likely be unsuccessful because European football affords clubs the ability to make millions per year through broadcasting revenue and prize money and consequentially, would be rendered an economic activity under *Walrave* and subject to European Union competition law under *Meca-Medina*.[285] Consequently, Article 101 of the TFEU applies to FFP.

The ECJ in *Wouters* set forth a test for determining whether a sports association regulation violated Article 101.[286] The Court found that it must consider the following: (1) whether the sports association that promulgated the rule is an "undertaking" or an association of

278. Conn, *supra* note 1.

279. Kilb, *supra* note 52, at 823.

280. Serby, *supra* note 152, at 38; Case 36/74, Walrave v. Ass'n Union Cycliste Internationale, 1974 E.C.R. 1405.

281. Serby, *supra* note 152, at 38; *Walrave*, 1974 E.C.R. at 1405.

282. Serby, *supra* note 152, at 38; *Walrave*, 1974 E.C.R. at 1405.

283. Serby, *supra* note 152, at 39; Case C-519/04P, Meca-Medina and Majcen v Commission, 2006 E.C.R. I-699.

284. Serby, *supra* note 152, at 39; *Meca-Medina & Majcen*, 2006 E.C.R. at I-699.

285. *See* Kaplan, *supra* note 4, at 812 - 814; *Meca-Medina*, 2006 E.C.R. I-699; *Walrave*, 1974 E.C.R. 1405; *see also* Galatasaray v. UEFA, CAS 2016/A/4492 ¶¶41, 44 (2016).

286. Bastianon, *supra* note 146, at 27-28, 31; C-309/99, J.C.J. Wouters v Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577.

undertakings; (2) whether trade between member states is affected; (3) whether the rule in question restrict competition according to Article 101(1); (4) whether the rule fall into the saving provision of Article 101(3).[287]

a. First Question: Is UEFA an Undertaking or Association of Undertakings?

The first issue is whether UEFA is an undertaking under Article 101. An undertaking is an economic entity.[288] The European Commission has determined that UEFA is considered both an association of undertakings and an undertaking itself because of the ECJ's view that an undertaking includes "every entity engaged in an economic activity, regardless of the legal status of the entity."[289] Furthermore, an entity can be an undertaking regardless of the way it is financed or if it is profit making.[290] Each club makes money through the sale of tickets, merchandise, and other revenue.[291] Therefore, each club falls under the definition of undertaking.[292] When the clubs combine to form their respective leagues, and, in turn, their football associations, the football associations are classified as associations of undertakings.[293] However, the national football associations also engage in their own economic activity through advertising, selling tickets and merchandise, and television broadcasting.[294] Consequently, national football associations constitute undertakings as well.[295] The football associations then form UEFA, an association of undertakings.[296]

287. Bastianon, *supra* note 146, at 27-28, 31; *J.C.J. Wouters*, 2002 E.C.R. at I-1577.

288. Kaplan, *supra* note 4, at 813-814; Case C-67/96, Albany Int'l BV v. Stichting Bedrijfspensioenfonds Textielindustrie, 1999 E.C.R. I-5886, ¶ 77; Bastianon, *supra* note 146, at 25.

289. Bastianon, *supra* note 146, at 31.

290. *See* Bastianon, *supra* note 146, at 31.

291. Kaplan, *supra* note 4, at 813-814; Dirk Kaufmann, *UEFA has commercialized football*, DW (Sept. 17, 2013), http://www.dw.de/uefa-has-commercialized-football/a-17095173 [https://perma.cc/8R68-WSVG].

292. *See* Kaplan, *supra* note 4, at 813-814; Kaufmann, *supra* note 291.

293. *See* Kaplan, *supra* note 4, at 813-814.

294. *See* Kaplan, *supra* note 4, at 813-814.

295. Bastianon, *supra* note 146, at 31; *see* Kaplan, *supra* note 4, at 813-814

296. *See* Bastianon, *supra* note 146, at 31; *see also* Galatasaray v. UEFA, CAS 2016/A/4492 ¶60 (2016); *see* Kaplan, *supra* note 4, at 813-814.

UEFA is also an undertaking because it engages in its own economic activity.[297] UEFA receives money from the media rights and commercial contracts from its Champions League and Europa League competitions. UEFA keeps approximately twenty percent of the amount generated from these tournaments.[298] Because it is revenue generating, UEFA is likely considered an undertaking for purposes of Article 101.[299] Therefore, the first *Wouters* prong is met because UEFA operates as both an undertaking and an association of undertakings as required by Article 101 of the TFEU.[300]

b. Second Question: Is Trade Between Member States Affected?

The next question is whether trade between Member States is affected.[301] European case law indicates that trade between member states is broadly defined and "is not limited to traditional exchange of goods and services . . . [it covers] all cross-border economic activity."[302] FFP likely meets this prong because of its impact on the exchange of player services, which would fit in the broad definition of "trade between member states."[303] Therefore, UEFA affects trade between member states because the break-even requirement restricts football clubs' capacity to purchase players from different member states.[304]

c. Third Question: Does FFP in Effect Restrict Competition?

The following, most contentious question is whether FFP effectively restricts competition.[305] Striani argued, citing several scholars, that the break-even rule serves as a relative restriction on

297. *See* Kaplan, *supra* note 4, at 813-814.

298. Bastianon, *supra* note 146, at 31; Case T-193/02, Piau v Comm'n, 2005 E.C.R. II-209.

299. *See* Kaplan, *supra* note 4, at 813-14; Kaufmann, *supra* note 291, at 109.

300. Bastianon, *supra* note 146, at 32.

301. *See* Bastianon, *supra* note 146, at 36; *see also* TFEU, *supra* note 194, art. 101; Kaplan, *supra* note 4, at 817-18.

302. Bastianon, *supra* note 146, at 36; Commission Notice (EC), Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81; *see* Kaplan, *supra* note 4, at 817-18.

303. Bastianon, *supra* note 146, at 36; *see* Kaplan, *supra* note 4, at 817-18.

304. *See* Bastianon, *supra* note 146, at 36; Kaplan, *supra* note 4, at 817-18.

305. *See generally* TFEU, *supra* note 194, art. 101; Galatasaray v. UEFA, CAS 2016/A/4492 (2016) at 18-19; Bastianon, *supra* note 146, at 26.

investment because the club must experience high levels of relevant income to significantly spend and cannot operate at a deficit larger than EU€30 million.[306] Furthermore, studies show that there is a direct relationship with the club's spending power and their success on the field, which in turn leads to more revenue through competition awards and television sponsorships.[307] Consequently, FFP secures the dominance of the large clubs because they are developed and have consistent large revenue streams that can fund increased spending levels.[308] Studies have also shown that the break-even constraints do not negatively impact the larger well-established clubs to the extent they do smaller clubs.[309] These studies support the argument that FFP protects the elite clubs who had well-established sporting and financial systems prior to FFP's promulgation.[310] This argument seems especially compelling when considering that these elite clubs (with the exception of PSG), have dominated both the market for players and the competitions since FFP's implementation.[311] Ultimately, FFP serves as a barrier to entry for new clubs and new investors who take over clubs.[312] However, the *Wouters* test requires the presiding judge to consider three factors in analyzing whether the regulations restrict competition: (1) the overall context in which the rule was adopted, its effects, and its objectives, (2) whether the restrictions caused by the rules are inherent in the pursuit of the objectives, and (3) whether the rule is proportionate in light of the objective pursued.[313]

306. Bastianon, *supra* note 146, at 32; *see generally* Kaplan, *supra* note 4, at 823-28, 830-35.

307. *See* Bastianon, *supra* note 146, at 32; *see generally* Kaplan, *supra* note 4, at 823-28, 830-35.

308. *See* Bastianon, *supra* note 146, at 32; *see generally* Kaplan, *supra* note 4, at 823-28, 830-35.

309. Ronan Gallagher et al., *Regulatory Own Goals: The Unintended Consequences of Economic Regulation in Professional Football* 20 (Working Paper, 2017); *see generally* Kaplan, *supra* note 4, at 823-28, 830-35.

310. *See* Ronan Gallagher et al., *Regulatory Own Goals: The Unintended Consequences of Economic Regulation in Professional Football* 20 (Working Paper, 2017); *see generally* Kaplan, *supra* note 4, at 823-28, 830-35. *Contra* Galatasaray v. UEFA, CAS 2016/A/4492 ¶¶67-68, 74 (2016). The CAS found that there were no negative effects on the market when applying Article 101.

311. *Deloitte Football Money League 2019*, DELOITTE (Jan. 2019), https://www2.deloitte.com/uk/en/pages/sports-business-group/articles/deloitte-football-money-league.html [https://perma.cc/E9V6-FFCP] [hereinafter *Deloitte Money League*]; *History*, *supra* note 258. *Contra* Galatasaray v. UEFA, CAS 2016/A/4492 ¶¶67-68, 74 (2016).

312. Bastianon, *supra* note 146, at 32.

313. *See* Bastianon, *supra* note 146, at 28.

UEFA's objectives of improving football clubs' financial capabilities, transparency, credibility, and protection of creditors, and the long-term viability of European football likely meet the first requirement because the objectives are legitimate.[314] In determining whether the restrictions caused by the rules are inherent in the pursuit of the objectives, it seems likely that limiting club spending and investment from wealthy benefactors are inherent in the pursuit of the aforementioned objectives when considering the history of financial issues that football clubs experienced as a result of overspending and overdependence on wealthy owners.[315] When considering the origins of past financial chaos, the imposition of timely payable payments and prudent budgetary management are likely also inherent in the pursuit of ensuring the sustainability and viability of European football clubs.[316] However, the largest point of contention is FFP's proportionality—specifically, the break-even requirement.[317]

The function of FFP's break-even rule is to prevent overinvestment and usher responsible spending.[318] However, the overinvestment in players is spurred by the principle that the more you spend, the more likely you are to win, and the more likely you are to win, the higher the probability that you will earn monetary awards and broadcasting revenue.[319] These payouts provide an incentive for clubs to overinvest in players.[320] Reducing these payouts would diminish the incentive to overinvest.[321] Therefore, changing this principle through a recalibration of monetary awards and broadcasting revenue distribution would likely be a sufficient means in protecting the viability of European football clubs while simultaneously placing less pressure on competition than the break-even rule.[322]

Another more proportional means of achieving UEFA's objectives would be the implementation of a hard spending cap because

314. *See* Bastianon, *supra* note 146, at 33.

315. *See Galatasaray*, CAS 2016/A/4492 ¶¶77-79. *Contra* Bastianon, *supra n*ote 146, at 35.

316. *See Galatasaray*, CAS 2016/A/4492 ¶¶77-79. C*ontra* Bastianon, *supra* note 146, at 35

317. Bastianon, *supra* note 146, at 35; *see generally* Kaplan, *supra* note 4, at 850, 856.

318. *See* Bastianon, *supra* note 146, at 35.

319. *See* Bastianon, *supra* note 146, at 35.

320. Johan Lindholm, *The Problem with Salary Caps Under European Union Law: The Case Against Financial Fair Play,* 12 TEX. REV. ENT. & SPORTS L. 189, 211 (2011).

321. *See id*.

322. Bastianon, *supra* note 146, at 35; *see* Kaplan, *supra* note 4, at 837-39, 850, 856.

overspending would still be curtailed, but the negative effect on competition would be less severe.[323] FFP is a relative salary cap because the amount that a club can spend is limited by the revenue it generates.[324] The large clubs always have the capacity to spend more on players because they earn more than smaller clubs.[325] This relative salary cap restricts competition because as mentioned prior, the more you spend, the higher the likelihood of success, and more success earns more revenue.[326] This essentially creates a cycle where the same top teams continue to win and grow their revenue while the smaller teams are stuck at the bottom because they are unable to grow through responsible owner investment.[327] Under a hard spending cap regime, UEFA would accomplish its objective of limiting clubs' spending and avoid constraining competition because the spending limitation would be uniformly applied rather than relative to a club's earnings.

It is also argued that the prohibition of overdue payables rule alone is sufficient to protect the sustainability of European football clubs.[328] The prohibition of overdue payables would prevent the scenario where clubs spend money they do not have by taking on debt they cannot feasibly pay back.[329] Therefore, the overdue payable rule procures future club sustainability because it would prevent football clubs from becoming insolvent and filing for bankruptcy.[330] On

323. *See* Bastianon, *supra* note 146, at 34; *see* Kaplan, *supra* note 4, at 837-839, 854; This proposition is also supported by the fact that clubs have incurred a dramatic increase in television revenue that has allowed them to improve their general spending capacity. With a hard cap and simultaneous increases in broadcast revenue, clubs would theoretically reach financial parity. 2016 UEFA CLUB BENCHMARKING, *supra*, note 163; MICHAEL BARNARD ET AL., ROAR POWER: ANNUAL REVIEW OF FOOTBALL FINANCE 2018 (2018), *available a*t https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-sbg-annual-review-of-football-finance-2018.PDF [https://perma.cc/SD7D-M3Y3] [hereinafter DELOITTE FINANCE REVIEW]; Paul MacInnes, *Worldwide websites and money, money, money: Uefa's football trends,* THE GUARDIAN (Jan. 25, 2018), https://www.theguardian.com/football/2018/jan/25/worldwide-websites-money-uefa-football-trends [https://perma.cc/FTV7-Y6NS].

324. *See* Bastianon, *supra* note 146, at 34; *see* Kaplan, *supra* note 4, at 837-39, 854.

325. *See* Bastianon, *supra* note 146, at 34; *see* Kaplan, *supra* note 4, at 837-39, 854.

326. *See* Bastianon, *supra* note 146, at 34; *see* Kaplan, *supra* note 4, at 837-39, 854.

327. *See* Bastianon, *supra* note 146, at 34; *see* Kaplan, *supra* note 4, at 837-39, 854.

328. *See* Bastianon, *supra* note 146, at 35; *see generally* Kaplan, *supra* note 4, at 837-39, 850.

329. *See* Bastianon, *supra* note 146, at 35; *see generally* Kaplan, *supra* note 4, at 837-39, 850.

330. *See* Bastianon, *supra* note 146, at 35; *see generally* Kaplan, *supra* note 4, at 837-39, 850.

balance, it seems likely that FFP is not proportionate under *Wouters*.[331] Consequently, it is likely FFP effectively restricts competition.[332]

d. Fourth Question: Does FFP Fall Under Article 101(3)'s Exception?

Article 101(3) provides a saving provision that could be used for UEFA's break-even requirement.[333] Article 101(3) states that paragraph (1) does not apply in the case of any agreement that meets the following four conditions:

> (a) Improves the production or distribution of goods or the promotion of technical or economic progress and
>
> (b) Allows consumers a fair share of the resulting benefit, and
>
> (c) *Does not* impose on the restrictions which are not indispensable to the attainment of these objectives or
>
> (d) *Does not* afford such undertakings the possibility of eliminating competition in respect to a substantial part of the products in questions.[334]

To determine whether FFP falls under Article 101(3)'s exception, these conditions must be considered. This analysis is conducted in the subsequent sections.

1. Does FFP Improve Economic Efficiency?

The first element questions whether FFP produces economic efficiencies.[335] The argument in support of FFP is that since the break-even rule's promulgation, clubs have experienced cost efficiencies.[336] The break-even rule arguably creates efficiencies because it increases the financial stability and sustainability of football clubs due to its imposition of a balanced budget.[337] While such arguments are compelling, issues arise with regard to proving causation between the

331. Bastianon, *supra* note 146, at 34-35. *Contra* Galatasaray v. UEFA, CAS 2016/A/4492 ¶¶76-79 (2016).

332. Bastianon, *supra* note 146, at 34-35; *see generally* Kaplan, *supra* note 4, at 837-39, 850, 856. *Contra Galatasaray*, CAS 2016/A/4492 ¶¶76-79.

333. TFEU, *supra* note 194, art. 101.

334. Bastianon, *supra* note 146, at 36; *see* Kaplan, *supra* note 4, at 835-37; *see generally* TFEU, *supra* note 194, art. 101 (emphasis added).

335. Bastianon, *supra* note 146, at 36; *see generally* Kaplan, *supra* note 4, at 835-37.

336. *See* Bastianon, *supra* note 146, at 36; *see generally* Kaplan, *supra* note 4, at 835-37.

337. *See* Bastianon, *supra* note 146, at 37; *see generally* Kaplan, *supra* note 4, at 835-37.

break-even requirements and the resulting economic efficiencies.[338] European football has experienced a boon in television broadcasting revenue, which could be argued as the largest contributor to the economic success and stability that these football clubs have experienced since FFP's implementation.[339] It would be interesting to see how a decline in television bidding and broadcast rights deals would impact the efficiency of European football clubs.[340] Nevertheless, UEFA's argument is compelling given subsequent results and consequently, the break-even requirement would likely meet Article 101(3)'s first criteria.

2. Do Consumers Share in the Benefits?

The second element under Article 101(3) questions the relationship between the break-even requirement and the produced efficiencies for consumers.[341] UEFA would need to prove that the consumers receive a fair portion of the efficiencies generated by the FFP. Here the arguments seem to balance.[342] There are two consumers to consider when analyzing whether FFP meets this condition, the fans and the players. Regarding the fans, there has been an increase in both attendance and viewership due to both stadium investment,[343] lucrative television deals,[344] and improved social media presence.[345] Assuming arguendo that the economic efficiencies are caused by the break-even rules, it would seem that fans have shared in the expansion and improved financial standing of football clubs.[346]

The more complex question is whether the players are also sharing in the assumed economic efficiencies.[347] Here, there is uncertainty. Given FFP's relative spending cap on European football clubs, it is

338. *See* Bastianon, *supra* note 146, at 37; *see generally* Kaplan, *supra* note 4, at 835-37.

339. MacInnes, *supra* note 323; DELOITTE FINANCE REVIEW, *supra* note 323.

340. *A weak market for football rights suggests a lower value for sport*, THE ECONOMIST (Jan. 18, 2018), https://www.economist.com/business/2018/01/18/a-weak-market-for-football-rights-suggests-a-lower-value-for-sport [https://perma.cc/C7HG-TS24] [hereinafter *A Weak Market*].

341. Bastianon, *supra* note 146, at 37; *see generally* Kaplan, *supra* note 4, at 835-37.

342. *See* Bastianon, *supra* note 146, at 37; *see generally* Kaplan, *supra* note 4, at 835-37.

343. 2015 UEFA CLUB BENCHMARKING, *supra* note 158, at 35, 45.

344. MacInnes, *supra* note 323.

345. Joanne Kuzma et al., *A Study of the Use of Social Media Marketing in the Football Industry*, 5 J. EMERGING TRENDS IN COMPUTING & INFO. SCI. 728, 729 (2014).

346. 2015 UEFA CLUB BENCHMARKING, *supra* note 158, at 35.

347. Bastianon, *supra* note 146, at 37.

plausible that such caps will hamper the earning potential of football players.[348] However, wages have continued to rise since FFP's implementation.[349] Nevertheless, as mentioned prior, the causation seems attenuated due to the boon that European football has experienced from lucrative television deals.[350] Therefore, it may not be UEFA's regulatory system that has led to the appreciation in player wages. In fact, it could be argued that the break-even requirement limits what otherwise could be an even larger growth in player wages.[351]

The argument in favor of FFP is that players are now deciding to take matters into their own hands by deciding to let their contracts expire and subsequently sign large contract deals with new clubs.[352] This is primarily a result of the ECJ's *Bosman* ruling, which opened the door for players to leave on "free transfers."[353] A "free transfer" is where players can be directly approached by clubs for contract talks after their contracts expire.[354] A free transfer is similar to unrestricted free agency in the NBA.[355] Typically, the buying club would have to pay the selling club a transfer fee and then negotiate a contract with the player.[356] The potential savings are significant because transfer fees seem to be growing exponentially.[357] For example, the record-breaking

348. *See* Bastianon, *supra* note 146, at 37.

349. *The business of football: Are wages more affordable*?, KPMG (Mar. 10, 2017), https://www.footballbenchmark.com/leagues_salaries [https://perma.cc/Y4XX-SUZH] [hereinafter *KPMG Wages*].

350. DELOITTE FINANCE REVIEW, *supra* note 323; MacInnes, *supra* note 323.

351. *See generally* Bastianon, *supra* note 146, at 37.

352. *See generally* John Crabb, *10 huge players who are currently going on free transfers in summer 2018*, FOUR FOUR TWO (Sept. 14, 2017), https://www.fourfourtwo.com/features/10-huge-players-who-are-currently-going-free-transfers-summer-2018 [https://perma.cc/5QZQ-J4WP].

353. Gerard Brand, *How the Bosman rule changed football - 20 years on*, SKY SPORTS (Dec. 15, 2015), http://www.skysports.com/football/news/11095/10100134/how-the-bosman-rule-changed-football-20-years-on [https://perma.cc/G3RA-LBLA].

354. *Id.*

355 *See generally Free Agency Explained*, NBA, http://www.nba.com/free-agency-explained [https://perma.cc/H6TB-34HS] (last visited Feb. 13, 2019).

356. Ben Hayward, *Neymar to PSG: How much will he earn, transfer fee, contract length and full Barcelona exit details*, GOAL (Aug. 2, 2017), http://www.goal.com/en-us/news/neymar-to-psg-how-much-will-he-earn-transfer-fee-contract-length-/cosb1yh848ew1ergqy3zy562d [https://perma.cc/H2LJ-DGEV].

357. *See id.; see also* Miriam Quick*, How does a football transfer work?* BBC (Aug. 29, 2017), *http://www.bbc.com/capital/story/20170829-how-does-a-football-transfer-work;* Eberhard Fees & Gerd Muehlheusser, *The Impact of Transfer Fees on Professional Sports: An Analysis of the New Transfer System for European Football*, 105 SCANDINAVIAN. J. OF ECON,

transfer deal for Brazilian star, Neymar, required a transfer fee of approximately EU€270 million to be paid to the selling club, Barcelona FC, and a contract with the player that pays him approximately EU€30 million annually.[358] As it stands, Paris Saint-Germain will have incurred relevant expenses of approximately EU€300 million for the 2017-2018 reporting season.[359] If Neymar had let his contract with Barcelona expire, he hypothetically would have earned more than EU€30 million annually because PSG would have avoided adding the EU€270 million transfer fee to its 2017-2018 relevant expenses. Therefore, due to the break-even requirement's relative cap on spending, free transfers are more attractive because clubs can circumvent paying transfer fees, leaving more money to allocate to players' contracts.[360] As a result, FFP's break-even requirement strengthens the incentive for players to let their contracts dwindle down and then request larger contracts from the buying clubs.[361] Accordingly, it is plausible that players have shared in the efficiencies generated by FFP because it has compounded their negotiating power and earnings potential by further incentivizing them to let contracts expire and declare for the European football equivalent of free agency.

On balance, the arguments opposing FFP appear more compelling. The current rise in player wages seems to have been primarily caused by increased broadcasting revenues, rather than FFP's implementation.[362] Also, if broadcasting revenue were to decline or stagnate, FFP's spending restraints may eventually lead to a depreciation in player wages regardless of whether players opt to let their contract expire or transfer fees are paid.[363] Consequently, it is likely that FFP does not produce efficiencies for consumers because players' earning power is limited by the relative spending cap.[364]

139, 140 (2003) (stating that the fees incurred by the purchasing club during a free transfer would be less expensive than paying a transfer fee).

358. Jeremy Woo, *Report: Neymar transfer to cost PSG nearly €500M in fee and salary*, SPORTS ILLUSTRATED (Aug. 8, 2017), https://www.si.com/soccer/2017/08/02/neymar-psg-barcelona-transfer-deal-contract-terms [https://perma.cc/MH57-EXBB].

359. *See id*.

360. Brand, *supra* note 316.

361. *See* Brand, *supra* note 316.

362. Bastianon, *supra* note 146, at 37.

363. *See generally* DELOITTE FINANCE REVIEW, *supra* note 323; MacInnes, *supra* note 323; *A Weaker Market*, *supra* note 337.

364. Bastianon, *supra* note 146, at 37; s*ee generally A Weaker Market*, *supra* note 337; Kaplan, *supra* note 4, at 835-37.

3. Are the Specific Restrictions Dispensable?

Assuming arguendo that the second element is met, Article 101(3) requires that for FFP to be upheld, it must not impose restrictions that are not crucial to the pursuance of the objectives.[365] The European Commission has provided guidance on the application of this requirement by promulgating a two-prong test.[366] The first prong is that the regulation must be reasonably necessary to achieving the purported efficiencies.[367] The second prong is that the ensuing restrictions on competition resulting from the regulation must be necessary to attain the intended efficiencies.[368] Even if FFP was deemed "reasonably necessary" to achieve the purported efficiencies that followed its implementation, there does not seem to be a compelling argument that FFP's restrictions of competition, caused by the break-even requirement's relative spending cap, are reasonably necessary to achieve the purported efficiencies.[369] As discussed prior, the break-even requirement's relative spending cap hampers competition through its handcuffing of historically smaller teams and reinforcement of the larger and perennial successful teams.[370] A hard cap on spending, which is not dependent on each team's generated revenue, would likely achieve the same purported efficiencies with less pressure on competition because each team will be able to spend the same amount regardless of income.[371] Ultimately, though it is plausible that FFP satisfies the first prong, it is likely that FFP would fail to meet the third prong of the Article 101(3) exception.

4. Does FFP Eliminate Competition for the Products in Question?

Lastly, to fall into the Article 101(3) protection, FFP must not *eliminate* competition of a substantial part of the products involved.[372]

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365. Bastianon, *supra* note 146, at 37; TFEU, *supra* note 194, art. 101.

366. Bastianon, *supra* note 146, at 37; Communication from the Commission (EC), Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 96.

367. *See* Bastianon, *supra* note 146, at 37.

368. *See* Bastianon, *supra* note 146, at 37.

369. *See* Bastianon, *supra* note 146, at 37.

370. *See* Bastianon, *supra* note 146, at 32-33; *see also* Gallagher, *supra* note 309, at 20; *see* Kaplan, *supra* note 4, at 823-28, 830-35.

371. Bastianon, *supra* note 146, at 32; *see* Kaplan, *supra* note 4, at 837-39, 854; Serby, *supra* note 152, at 47; *supra*, note 323 and accompanying text.

372. Bastianon, *supra* note 146, at 37; TFEU, *supra* note 194, art. 101 (emphasis added); *see generally* Kaplan, *supra* note 4, at 835-37.

Here, the products involved would be the players.[373] FFP's restrictions on equity partner and related party investments restrict the easiest way for smaller clubs to improve its player spending capacity and compete against the larger clubs.[374] However, FFP would likely satisfy this prong because even though it eliminates one avenue for improving a club's spending capacity, it still permits other revenue streams like match-day income, TV broadcasting rights, and sponsorship and commercial income.[375] Thus, the break-even requirement likely satisfies Article 101(3)'s fourth requirement because it does not *eliminate* the competition for players.[376]

In conclusion, the analysis in this section reveals that FFP likely violates Article 101(1) and does not fall into Article 101(3)'s exception. The potential of meritorious legal challenges under Article 101 should be considered and evaluated by UEFA. However, as the subsequent section details, there are regulatory flaws that also deserve UEFA's attention.

B. Regulatory Flaws and Oversights

1. Different Corporate Models

There are different legal forms that a football club can take. The method in which these clubs raise funds and operate are largely dependent on such legal forms.

a. The Spanish Socio Model

The first model, which has been criticized by non-Spanish football clubs, is the Spanish Socio Model.[377] This form of club governance has been adopted by two international football titans, FC Barcelona and Real Madrid CF.[378] The model's dependence on its fans is the main reason for it being called the "socio" model of club

373. *See* Kaplan, *supra* note 4, at 837; *see generally* Bastianon, *supra* note 146, at 37.
374. Bastianon, *supra* note 146, at 38.
375. *See* Bastianon, *supra* note 146, at 38.
376. *See* Bastianon, *supra* note 146, at 38; TFEU, *supra* note 194, art. 101 (emphasis added).
377. Ryan Murphy, *Playing Fair in the Boardroom: An Examination of the Corporate Structures of European Football Clubs*, 19 MICH. ST. J. INT'L L. 409, 415 (2013).
378. *See id*.

governance.[379] The organization of FC Barcelona gives fans large amounts of influence because its governing power is dependent on its members.[380] To become and remain a Barcelona "socio," an applicant must make a membership payment and maintain "good behavior."[381] Members can elect the president and Board of Directors, who are responsible for managing the daily operations of the club.[382] The election process requires that the president and every director provide a guarantee worth EU€1.5 million to the club.[383] Members may also be occasionally called upon to vote on any extraordinary issues that may arise.[384]

The club's structure provides an economic advantage because they receive a substantial amount of financial support through their membership dues.[385] Real Madrid operates similarly.[386] One difference is that in addition to the membership fees and good behavior, there is the additional requirement that the applicant be recommended by two current socios.[387] The members also elect a president who must be Spanish and a member of the club for at least ten consecutive years.[388] The elected president must also make a substantial bank guarantee.[389] In 2009 that guarantee was EU€57 million.[390] There are also wealth requirements to gain an elected office at Real Madrid, which ensures that it is run by competent business men.[391]

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379. *See id*.
380. *See id*.
381. *See id*. at 416.
382. *See id.*
383. *See id*. at 417.
384. *See id* at 415.
385. *See id* at 417; *see also* Alex Duff, *Barcelona Soccer Club Members Vote to Sue Laporta After Loss*, BLOOMBERG (Oct. 16, 2010), https://www.bloomberg.com/news/articles/2010-10-16/barcelona-soccer-club-members-vote-to-sue-former-president-after-loss.
386. *See* Murphy, *supra* note 377, at 420.
387. *See* Murphy, *supra* note 377, at 420.
388. *See* Murphy, *supra* note 377, at 421; *see also* REAL MADRID C.F., ESTATUTOS SOCIALES 11-12 (2009) http://www.realmadrid.com/StaticFiles/RealMadrid/img/pdf/LibroEstatutosSociales.pdf. [https://perma.cc/7U4W-4PXC] [hereinafter REAL MADRID CLUB STATUTES].
389. *See* Murphy, *supra* note 377, at 420.
390. *See* Murphy, *supra* note 377, at 420.
391. *See* Murphy, *supra* note 377, at 422.

b. The German Models

Another form of club governance is the German model which is unique because of its reputation for being profitable.[392] The Bundesliga, which is the name for the German league, is comprised of multiple club governance structures.[393] The traditional structure is the *eingetrager verein* ("e.V.") model which creates a legal personhood for the club but restricts the liability of its members.[394] This model includes at least seven members, a board, and a charter.[395] It does not have any capital requirements and no fixed organizational structure except the requirement for a board.[396] This legal form provides the most democratic and Barcelona-like structure to its fans and members, but many teams have moved away from this form because it is too decentralized and difficult to make long-term decisions regarding commercial revenue.[397]

The largest club in Germany, Bayern Munich, moved to the Aktiengesellschaft ("AG") structure.[398] This model is the most similar to an American corporation,[399] despite its dual board structure.[400] The supervisory board ("Aufsichtsrat") is elected during a shareholders' general meeting and the managing board ("Vorstand") is appointed by the elected supervisory board.[401] The supervisory board is also responsible for advising and monitoring the managing board.[402] Bayern Munich is unique because the Bundesliga rules prevent the club from classifying itself as an AG owned completely by shareholders.[403] As a result, Bayern Munich's ownership structure is more of an AG-e.V.

392. *See* Murphy, *supra* note 377, at 423; *see also* Jamie Jackson, *How the Bundesliga puts the Premier League to shame*, THE OBSERVER (Apr. 10, 2010), http://www.guardian.co.uk/football/blog/2010/apr/11/bundesliga-premier-league [https://perma.cc/549Y-UWHP].

393. *See* Murphy, *supra* note 377, at 424.

394. *See* Murphy, *supra* note 377, at 424.

395. *See* Murphy, *supra* note 377, at 424.

396. *See* Murphy, *supra* note 377, at 424.

397. *See* Murphy, *supra* note 377, at 424.

398. *See* Murphy, *supra* note 377, at 425.

399. *See* Murphy, *supra* note 377, at 425.

400. *See* Murphy, *supra* note 377, at 425.

401. *See* Murphy, *supra* note 377, at 425.

402. *See* Murphy, *supra* note 377, at 425.

403. *See* Murphy, *supra* note 377, at 425-26; *see also Company*, FC BAYERN MUNICH, https://fcbayern.com/en/club/company [] (last visited Mar. 28, 2019) (disclosing that Bayern Munich e.V owns 75% while the remaining share of the club is owned by Adidas, Audi, and Allianz).

hybrid.[404] Therefore, Bayern Munich's members pay an annual fee to belong to Bayern Munich e.V.,[405] which owns an seventy-five percent stake in Bayern Munich AG, the professional part of the club.[406] The remaining percentage is owned by Adidas and Audi.[407] The result of the hybrid form is that it allows fans to feel invested in the club, while also creating a more centrally organized operational structure where the club can raise capital and accommodate local businesses, such as Audi and Adidas, which in turn provide corporate advice and opportunities for commercial income.[408]

The third model that is used by German clubs in the Bundesliga is a form of partnership that includes both a general partner and limited partners.[409] This form of ownership structure is called Kommanditgesellschaft auf Aktien ("KGaA").[410] Investors can become limited partners by purchasing shares on the stock exchange.[411] This form differs from the AG structure because it has a general partner that assumes an unlimited personal liability of the KGaA rather than a Vorstand.[412] The KGaA is ideal for a corporation which intends to retain a great deal of control over the club while simultaneously being able to raise capital through the offering of equity.[413] BVB Borussia Dortmund is the best example of this structure.[414]

c. The English Model

The typical English club is registered as a public limited company ("PLC").[415] The form is similar to an American corporation and has the benefit of being permitted to sell shares to the general public.[416] However, there are two different models of control: the benefactor model and the standard business model.[417]

404. *See* Murphy, *supra* note 377, at 427; *see also Company*, *supra* note 403.
405. *See* Murphy, *supra* note 377, at 426.
406. *See* Murphy, *supra* note 377, at 426; *see also Company*, *supra* note 403.
407. *See* Murphy, *supra* note 377, at 426.
408. *See* Murphy, *supra* note 377, at 427.
409. *See* Murphy, *supra* note 377, at 428.
410. *See* Murphy, *supra* note 377, at 428.
411. *See* Murphy, *supra* note 377, at 429.
412. *See* Murphy, *supra* note 377, at 429.
413. *See* Murphy, *supra* note 377, at 429.
414. *See* Murphy, *supra* note 377, at 429.
415. *See* Murphy, *supra* note 377, at 431.
416. *See* Murphy, *supra* note 377, at 431.
417. *See* Murphy, *supra* note 377, at 431.

The benefactor model is a form of control where a rich individual acts as the sole benefactor of the club.[418] One example of this model is Manchester City FC where the Abu Dhabi United Group, led by Seikh Mansour bin Zayed al Nahyan, who is a key member of the Abu Dhabi royal family, purchased the club in 2008 and directly injected millions into the club through stadium renovation and player purchases.[419] In this model, the benefactor typically has complete control over the club and can make decisions without seeking approval.[420] This model was also popular in Italy where Silvio Berlusconi and Massimo Moratti were the wealthy benefactors of A.C. Milan and Internazionale F.C.[421]

The standard business owner model is a club that is run like a sustainable business.[422] With this structure, ownership can consist of a group of individuals or a single person (similar to a benefactor model).[423] However, this model provides more checks on spending than the benefactor model.[424] The premier example of this model is Liverpool FC where capital can be raised through issuing equity or debt, and management, Fenway Sports Group, is prudent in its spending and focused on profitability.[425]

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418. *See* Murphy, *supra* note 377, at 431.

419. *See* Murphy, *supra* note 377, at 434.

420. *See* Murphy, *supra* note 377, at 436.

421. Justin Sherman, *THE DEVIL'S ODYSSEY: HOW SILVIO BERLUSCONI TURNED AC MILAN INTO A SUPERPOWER,* THESE FOOTBALL TIMES (APR. 18, 2018), *https://thesefootballtimes.co/2018/04/18/the-devils-odyssey-how-silvio-berlusconi-turned-ac-milan-into-a-superpower/* [https://perma.cc/HN7D-4X5T]*; see also* Ben Gladwell, *Ex-owner Silvio Berlusconi: I am thinking of buying AC Milan back*, ESPN (Apr. 27, 2018), *http://www.espn.com/soccer/ac-milan/story/3473597/ex-owner-silvio-berlusconi-i-am-thinking-of-buying-ac-milan-back* [https://perma.cc/LS5G-XFMQ]; *#1425 Massimo Moratti*, FORBES, *https://www.forbes.com/profile/massimo-moratti/#2aa5d3581e5b* [https://perma.cc/EX9S-QT5J]; Ben Gladwell, *Massimo Moratti: I'm not interested in buying back Inter Milan shares,* ESPN (Sept. 21, 2017), http://www.espn.com/soccer/internazionale/story/3209835/massimo-moratti-im-not-interested-in-buying-back-inter-milan-shares [https://perma.cc/ZM8Z-BMFU] .

422. Murphy, *supra* note 377, at 437.

423. *See* Murphy, *supra* note 377, at 437.

424. *See* Murphy, *supra* note 377, at 437.

425. *See* Murphy, *supra* note 377, at 441; *see also FSG In or FSG Out? – Debating 7 years under the Liverpool FC owners*, THIS IS ANFIELD (Oct. 16, 2017), https://www.thisisanfield.com/2017/10/fsg-fsg-debating-7-years-liverpool-fc-owners/ [https://perma.cc/6J83-SVRP] [hereinafter *FSG In or Out*].

C. Advantages and Disadvantages under FFP

As stated above, Barcelona and Real Madrid generate revenue from membership fees.[426] The income generated from membership fees is very similar to income from equity partners or related party transactions, which UEFA has limited through FFP.[427] However, membership fees paid to the club are not included in the definition of related party transactions.[428] Instead, the revenue generated from membership fees is considered football-related income under FFP's current form.[429] An absence of regulation on the revenue generated by membership fees creates an unfair advantage as Umberto Gandini, then AC Milan Organizing Director and Vice President of the European Club Association, alluded to when he asked why "180,000 Barcelona shareholders annually fund their club and Abramovich, to say a random name, cannot?"[430] Roman Abramovich is the wealthy owner of the English football club Chelsea Football Club ("Chelsea").[431] Chelsea utilizes the wealthy benefactor model due to Roman Abramovich's mass wealth.[432] Umberto Gandini's quote is indicative of how FFP provides an advantage to clubs that use the socio model and similar organizational structures over clubs that utilize other models.

1. "Financial Doping" through Lucrative Related Party Deals

Related party sponsorship deals have been used to artificially enhance a club's revenue. Paris Saint-Germain has used this tactic in the past and was reprimanded for such actions in 2014.[433] PSG is owned by Oryx Qatar Sports Investments ("QSi"), a fund supported by the Qatari government and under the leadership of Nasser Al-

426. Kilb, *supra* note 52, at 822.
427. *See* Kilb, *supra* note 52, at 822.
428. *See* Kilb, *supra* note 52, at 822.
429. *See* Kilb, *supra* note 52, at 822.
430. *See* Kilb, *supra* note 52, at 822.
431. *#140 Roman Abramovich*, FORBES, https://www.forbes.com/profile/roman-abramovich/#30d8a954134a [https://perma.cc/E4KQ-ZAVM] (last visited Feb. 13, 2019).
432. *Id.*
433. UEFA's Club Financial Control Body, *Decision of the Chief Investigator of the CFCB Investigatory Chamber: Settlement Agreement with Paris Saint-Germain Football Club*, https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/ClubFinancialControl/02/10/68/99/2106899_DOWNLOAD.pdf [https://perma.cc/5U68-JLFP] [hereinafter *PSG 2014 Settlement*].

Khelaifi.[434] In 2013, Nasser Al-Khelaifi was made Minister without Portfolio in the Qatari government by the Emir of Qatar, Sheikh Tamim.[435] Nasser Al-Khelaifi was also childhood friends with Crown Prince of Qatar, Tamim bin Hamad al-Thani.[436] His company, QSi, essentially serves as the sports business arm of the Qatari government.[437] In 2012, the club signed a sponsorship deal with the Qatar Tourism Authority, which is also managed by the Qatari Government.[438] The deal proposed to grant PSG approximately EU€200 million over each of the following four seasons.[439] The deal was considered "financial doping" because the contract was deemed by UEFA to have a fair value less than the proposed terms.[440] Financial Doping is a prevalent issue even after PSG's 2014 Sanctions. PSG's summer purchases of Neymar for EU€270 million and Kylian Mbapeé for EU€180 million, without any significant player sales, raises reasonable suspicion that they have financially doped because,

434. Saj Chowdhury, *Neymar: How can PSG afford to pay £198m for the Barcelona forward?*, BBC (Jul, 22, 2017) https://www.bbc.com/sport/football/40690701 [https://perma.cc/LB6U-ER64]*; see also Nasser Al-Khelaifi,* UEFA.COM, https://www.uefa.com/insideuefa/about-uefa/executive-committee/news/newsid=2590558.html [https://perma.cc/9V24-YZ4Y] (last visited Mar. 28, 2019); *see also* Andy Brown, *Questions remain over Nasser Al-Khelaifi's appointment to UEFA*, SPORTS INTEGRITY INITIATIVE (Jan. 31, 2019), https://www.sportsintegrityinitiative.com/questions-remain-over-nasser-al-khelaifis-appointment-to-uefa/ [https://perma.cc/FF94-23FA].

435. *See* Stephanie Baker, *Qatar builds its investments and its influence in a stormy Middle East*, THE WASHINGTON POST (Aug. 9 2013), https://www.washingtonpost.com/business/qatar-builds-its-investments-and-its-influence-in-a-stormy-middle-east/2013/08/08/a09b537e-fe00-11e2-9711-3708310f6f4d_story.html?noredirect=on&utm_term=.a195b9f47772 [https://perma.cc/F7F7-XJMW]; *see also Qatari PSG boss Nasser Al-Khelaifi elected to UEFA Executive Committee with DFB support,* DW, https://www.dw.com/en/qatari-psg-boss-nasser-al-khelaifi-elected-to-uefa-executive-committee-with-dfb-support/a-47383900 [https://perma.cc/8ALS-3576] (last visited Mar. 28, 2018); *see generally Nasser Al-Khelaifi*, BEIN MEDIA GROUP, https://www.beinmediagroup.com/the-group/nasser-al-khelaif [https://perma.cc/Q9WG-EMRQ] (last visited Mar. 28, 2019).

436. David Hytner, *Nasser al-Khelaifi, Paris Saint-Germain's Mr Big, has dream to match*, THE GUARDIAN (Sep. 20, 2012), https://www.theguardian.com/football/2012/sep/20/nasser-al-khelaifi-paris-saint-germain [https://perma.cc/QG47-FDGP].

437. *See id*.

438. Kilb, *supra* note 52, at 818.

439. Kilb, *supra* note 52, at 818*; see also* David Conn*, PSG v Manchester City emblematic of how Gulf rivals are fuelling football*, THE GUARDIAN (Apr. 5, 2016) https://www.theguardian.com/football/blog/2016/apr/05/manchester-city-psg-champions-league-football-finance [https://perma.cc/4AQR-VQAG].

440. *See* Chowdhury, *supra* note 434; *PSG 2014 Settlement*, *supra* note 433, at 1.

otherwise, PSG's relevant income likely does not balance their exorbitant relevant expenses.[441]

Another example is Manchester City's sponsorship deal with Etihad Airways for more than EU€450 million over ten seasons.[442] Manchester City is owned by Sheikh Mansour bin Zayed al-Nahyan of the Abu Dhabi ruling family, which also owns Etihad Airways.[443] However, this sponsorship deal differs from PSG's sponsorship deal with the Qatar Tourism Authority because it included money for youth development and stadium naming rights.[444] Notably, the deal does not say how much is going to each category.[445] The lack of specificity regarding the allocation of funds and other methods used to add complexity and ambiguity create a cloud around the source of the revenue and the fair value of the transaction.[446] Ultimately, such tactics have made it difficult to determine whether the club is in compliance with FFP and potentially allowed the club to avoid stricter sanctions.[447]

Compounding the unfair advantage is UEFA's toothless reprimand of these clubs for failing to comply with FFP's break-even requirement. For example, PSG agreed to a Settlement Agreement with

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441. *See* Chowdhury, *supra* note 434; *see also* David Conn, *Paris Saint-Germain may face UEFA sanctions for over-valued Qatari deals*, THE GUARDIAN (Apr. 11, 2018), https://www.theguardian.com/football/2018/apr/11/psg-may-face-uefa-sanctions-overvalued-qatari-deal [https://perma.cc/M2LD-736W].

442. Kilb, *supra* note 52, at 819; *see also* Daniel Taylor, *Manchester City bank record £400m sponsorship deal with Etihad Airways*, THE GUARDIAN (Jul. 8, 2011), https://www.theguardian.com/football/2011/jul/08/manchester-city-deal-etihad-airways [https://perma.cc/HW3D-ZTYV].

443. David Conn, *Manchester City accounts show Sheikh Mansour has put £1.3bn into club*, THE GUARDIAN (Sept. 13, 2018), https://www.theguardian.com/football/2018/sep/13/manchester-city-accounts-sheikh-mansour [https://perma.cc/2FWV-Z4L6]; MANCHESTER CITY, https://www.mancity.com/fans-and-community/club/corporate-information [https://perma.cc/A643-TUEZ] (last visited Feb. 13, 2019); *Corporate profile*, ETIHAD, https://www.etihad.com/en-us/about-us/corporate-profile/ (last visited Feb. 13, 2019).

444. Kilb, *supra* note 52, at 819.

445. *See* Kilb, *supra* note 52, at 819.

446. *See* Kilb, *supra* note 52, at 819; *see also* Tom Morgan, *Manchester City could face Champions League ban from next season,* THE TELEGRAPH (Dec. 3, 2018), https://www.telegraph.co.uk/football/2018/12/03/manchester-city-could-face-champions-league-ban-next-season/ [https://perma.cc/6H4K-K6TN] [hereinafter Morgan, *Champions League ban*]; Tom Morgan, *Uefa's chief investigator confirms Manchester City could face Champions League ban,* THE TELEGRAPH (Jan. 3, 2019), https://www.telegraph.co.uk/football/2019/01/03/uefa-chief-investigator-confirms-manchester-city-could-face/ [https://perma.cc/4KLR-KYY2] [hereinafter Morgan, *Uefa's chief investigator confirms*].

447. *See* Kilb, *supra* note 52, at 819; *see also* Morgan, *Champions League ban*, *supra* note 446; Morgan, *Uefa's chief investigator confirms*, *supra* note 446.

the CFCB for its financial doping in 2014.[448] The terms stipulated that PSG pay a fine of EU€60 million, which were to be withheld from the revenue it generated from UEFA competitions, and be limited to registering a maximum of twenty-one players for UEFA tournaments instead of the customary twenty-five players.[449] Moreover, the settlement required that PSG report a maximum break-even deficit of EU€30 million for the following year, and then break-even the following year.[450] Such terms are a slap on the wrist for a club that is as wealthy as PSG.

2. Lack of Proactivity and Regulations Regarding New Buyers

Italian football club giant AC Milan was sold in 2017 by former Italy-prime Minister Silvio Berlusconi to Yonghong Li for approximately EU€750 million.[451] The following summer, the new AC Milan ownership spent approximately EU€200 million in bringing in new players.[452] However, as the New York Times reported, there was intense suspicion as to the identity of these new owners and their financial resources.[453] The New York Times reported that Yonghong's claimed mining assets were in fact owned by someone else.[454] Furthermore, leading up to the purchasing of AC Milan, Yonghong Li borrowed EU€250 million from Elliot Management with an approximate ten percent interest rate and a change of control default provision.[455] The same Elliot Management who engaged in a fifteen-year debt battle with Argentina.[456] The inability to receive lending from traditional banks, combined with China's crackdown on foreign investment, raised suspicion as to the credibility and capacity of AC Milan's Owners. In February 2018, Milan owner Yonghong Li was

448. *PSG 2014 Settlement*, *supra* note 433, at 1.

449. *See PSG 2014 Settlement*, *supra* note 433, at 1.

450. *See PSG 2014 Settlement*, *supra* note 433, at 1.

451. Smith, *supra* note 258.

452. Tom Sunderland, *AC Milan Owner Reportedly Tried and Failed to Refinance Club Using Bitcoin*, BLEACHER REPORT (Mar. 26, 2018), https://bleacherreport.com/articles/2766614-ac-milan-owner-reportedly-tried-and-failed-to-refinance-club-using-bitcoin [https://perma.cc/PFU6-KKG8].

453. Tariq Panja et al., *China's Soccer Push Puts a Storied Team Under Murky Ownership*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/business/dealbook/china-soccer-acmilan-ownership.html?mwrsm=Facebook.

454. *See id*.

455. Smith, *supra* note 258.

456. Smith, *supra* note 258.

reported to have declared bankruptcy, less than a year after purchasing the team.[457] A few days prior, the China Securities Regulatory Commission announced the commencement of an investigation into potential illicit practices from his holding company Shenzhen Jie Ande.[458] Furthermore, the report claims that Yonhong Li was already insolvent by the time he gained control of the club in April 2017.[459] The rumors of bankruptcy subsequently subsided.[460] However, later reports have indicated that the lack of transparency regarding the owners was a significant impediment to any refinancing of the debt.[461] UEFA took notice of the financial issues facing AC Milan's owner, as it was the primary basis for the rejection of AC Milan's application for a Voluntary Agreement, citing "uncertainties in relation to the refinancing of the loans to be paid back in October 2018 and the financial guarantees provided by the main shareholder."[462] In other

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457. *See Reports: AC Milan Owner Yonghong Li Declares Bankruptcy*, SPORTS ILLUSTRATED (Feb. 19. 2018), https://www.si.com/soccer/2018/02/19/ac-milan-owner-yonghong-li-declared-bankrupt-according-reports-italy [https://perma.cc/JF3F-BBR9] [hereinafter *AC Milan Owner Bankruptcy*]; *see also* Milena Gabanelli & Mario Gerevini, *La cassaforte che ha comprato il Milan era già vuota*, CORRIERE DELLA SERA (Feb. 18. 2018), https://www.corriere.it/dataroom-milena-gabanelli/cassaforte-che-ha-comprato-milan-era-gia-vuota/2ee58002-1344-11e8-bbf7-75f50a916419-va.shtml?refresh_ce-cp [https://perma.cc/PUH9-6QXV].

458. *AC Milan Owner Bankruptcy*, *supra* note 457.

459. *See AC Milan Owner Bankruptcy*, *supra* note 457.

460. Smith, *supra* note 258.

461. Smith, *supra* note 258.

462. *Denial of Voluntary Agreement*, *supra* note 260; *see also* Bobby McMahon, *More Bad News For AC Milan, Facing UEFA Punishment With Less Than Six Months To Refinance $410M,* FORBES (May 23, 2018), https://www.forbes.com/sites/bobbymcmahon/2018/05/23/more-bad-news-for-ac-milan-less-than-six-months-to-refinance-410m-and-facing-uefa-sanctions/#2e616a013af2 [https://perma.cc/GMJ3-XGYM] [hereinafter McMahon, *More Bad News*]; Bobby McMahon, *UEFA Not Convinced By Milan Financial Fair Play Pitch; Rejects Option Of A Voluntary Settlement*, FORBES (Dec. 15, 2017), https://www.forbes.com/sites/bobbymcmahon/2017/12/15/uefa-not-convinced-by-milans-financial-fair-play-pitch-rejects-option-of-a-voluntary-settlement/#4aa514a22dca [https://perma.cc/28Z2-D37Y] [hereinafter McMahon, *UEFA Not Convinced*]; Ryan Benson, *AC Milan to re-enter Europa League as CAS rules to overturn ban*, GOAL.COM (Jul. 20, 2018), https://www.goal.com/en-us/news/ac-milan-set-to-re-enter-europa-league-as-cas-rules-to/11ylzmak1uhfs1bhbth03eh2a3 (citing CAS's focus on the change in ownership as a primary factor for the overturning of UEFA's decision to ban AC Milan from the Europa League); Ben Gladwell, *AC Milan's Europa League ban over FFP breach overturned by CAS*, ESPN (Jul. 20, 2018), http://www.espn.com/soccer/ac-milan/story/3570368/ac-milans-europa-league-ban-over-ffp-breach-overturned-by-cas [https://perma.cc/G8N5-B7BK] (reporting that the change in ownership was a key factor in the CAS's overturning of UEFA's decision to ban AC Milan from the Europa League).

words, UEFA was skeptical of Milan's long-term viability under the new regime.[463] The financial uncertainty led to statements from Silvio Berlusconi indicating that if conditions continued to deteriorate, he would buy back the club.[464] In the summer of 2018, under the change of control default remedy in the loan agreement, Elliot Management seized control of AC Milan.[465] AC Milan's financial and ownership instability reveals UEFA's lack of diligence of the financial risks that are inherent in the sale of European clubs to new buyers.

As argued in this Section, Financial Fair Play's legal questions and regulatory oversights call into question its effectiveness and sustainability. Such issues raise serious doubts regarding FFP's capacity to protect creditors and ensure the viability of European football clubs. The following Section suggests modifications to FFP that could potentially ameliorate some of these issues.

VI. MOVING FORWARD

The anti-competitive legal claims against FFP are compelling.[466] Consequently, FFP likely stands on unsteady legal ground. Furthermore, as PSG has shown, clubs have found ways to circumvent FFP.[467] Nevertheless, it is evident that FFP has garnered positive financial results.[468] Therefore, a complete overhaul of FFP is unnecessary as only modifications are needed. The proposed modifications are intended to improve the proportionality of FFP and ameliorate some regulatory flaws.

The first proposal is to impose an absolute spending cap rather than the current break-even relative spending cap. An absolute

463. *See generally Denial of Voluntary Agreement*, *supra* note 260; *See also* McMahon, *UEFA Not Convinced*, *supra* note 462 (regarding AC Milan's facing of potential punishment from UEFA and UEFA's rejection of a voluntary agreement); McMahon, *More Bad News, supra* note 462 (regarding AC Milan's facing of potential punishment from UEFA and UEFA's rejection of a voluntary agreement).

464. Ben Gladwell, *Ex-owner Silvio Berlusconi: I am thinking of buying AC Milan back*, ESPN (Apr. 27, 2018), http://kwese.espn.com/football/ac-milan/story/3473597/ex-owner-silvio-berlusconi-i-am-thinking-of-buying-ac-milan-back [https://perma.cc/SAT2-TJ47].

465. *Elliott takes control of AC Milan and announces significant capital injection*, CALCIO FINANZA (July 11, 2018), https://en.calcioefinanza.com/2018/07/11/elliott-takes-control-ac-milan-announces-significant-capital-injection/ [https://perma.cc/VB68-BU74].

466. *See supra* Section V.A.3.

467. *See supra* Section V.B.

468. *See supra* Section IV.C.

spending cap would assist in achieving FFP's goal of tapering football clubs' spending while simultaneously increasing competition because all clubs would have the same spending limitations.[469] The absolute spending cap does not favor larger clubs to the extent that the break-even requirement's relative spending cap does.[470] The hard cap on spending is less restrictive of competition and more acceptable under the *Wouters* analysis.[471] The absolute spending cap also cures FFP's regulatory flaws because clubs, like PSG, could not circumvent the spending cap by purchasing players via a form of financial doping. By replacing the break-even requirement with an absolute spending cap, financial doping would lose its appeal because, under the absolute cap, a clubs' spending capacity is not dependent on its "relevant income." Thus, the absolute spending cap eases both legal and regulatory pressures facing FFP.

A second proposal is to create an exception to the break-even requirement for clubs that experience a change of ownership. This modification to FFP would allow these clubs to incur a higher deficit if it is completely covered by a direct injection of capital from the owners. This modification counters the plausible legal anti-competition argument that FFP keeps smaller pre-FFP teams small.[472] Such an exception would make FFP more proportional because its allowance for more investment will loosen its pressure on competition while still limiting the risky spending that spurred FFP.

Finally, the last modification would be to create a screening process for potential club buyers. FFP should incorporate a preliminary judgment process where the CFCB evaluates the amount of debt that the new owner raised to make the purchase, their capacity to service the debt, and the club's projected future cash flow and capital structure. Essentially, the CFCB would assess the leverage that is being added to the club as a result of the takeover and assess the club's longevity post-purchase. UEFA likely has no legal authority to *prevent* such a transaction. Nevertheless, UEFA should issue a statement indicating concerns with the potential new owners' capacity to fund the team and the club's sustainability post-purchase. Such a statement would

469. Lindholm, *supra* note 320, at 211.

470. *See supra* Section V.A.3; Bastianon, *supra* note 146, at 34-35; Serby, *supra* note 152, at 47; *supra* note 323 and accompanying text.

471. *See supra* Section V.A.3; Bastianon, *supra* note 146, at 34-35; Serby, *supra* note 152, at 47; *supra* note 323 and accompanying text.

472. Dupont, *supra* note 201.

incentivize fans to boycott the club and voice their opposition to the team, and in turn, either dissuade the owner in completing the sale or push both parties back to the negotiation table to pursue a better deal structure.

VII. CONCLUSION

UEFA's Financial Fair Play Regulations have brought financial stability to European football. Nevertheless, both legal and regulatory issues exist. FFP's prevalent issues will likely be revealed on a grander scale due to CFCB's pending decision on PSG's explicit violation of the break-even requirement. UEFA's adoption of the proposed modification would likely ameliorate some of these legal and regulatory issues. Nevertheless, it is likely that 2019 will be a strong test of FFP's effectiveness and sustainability.