The purpose of this thesis is to analyse the compatibility of the UEFA Financial Fair Play (FFP) regulation with the European Union competition provisions and beyond.
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Summary

In the light of the present financial crisis, extensive discussions have been held within The Union of the European Football Associations (UEFA) about the fact that, despite a constant cash flow, the majority of clubs participating in the top of Europe’s divisions and leagues are actually loss-making. Therefore, the UEFA considered that guidelines are called for as a reaction to the alarming trends in recent years. Relying heavily on the financial criteria the UEFA extended the Club Licensing system by introducing the UEFA Financial Fair Play (FFP) regulations in 2010. The emphasis of the UEFA Financial Fair Play regulations is situated around the so called "break-even" requirement as a core criteria. On basis of this requirement clubs must take into account that the relevant expenses cannot exceed relevant incomes.

At the same time lawyer Jean-Louis Dupont brought a claim before the European Court of Justice (at behalf of player agent Daniel Striani) on basis that ‘Financial Fair Play in its current form will breach the competition provisions of EU law’. However, with the Commission in favour of the FFP Regulation, Duponts’ challenge is unlikely to be an easy ride and could take a number of years to conclude. Therefore the assessment that will probably take place, is already done within this thesis. On basis of a variety of methods in essence we can state that the relationship between Financial Fair Play and the European Competition provisions is very problematic. The UEFA will have a hard time with claims brought before the European Court of Justice, simply because especially under the scope of Article 101 TFEU Financial Fair Play seems to at least have some problems. Secondly, the situation of the UEFA can possibly get even worse because of the fact that most of the defences they can bring forward in Court cannot be upheld.

Since we’ve found the conclusion reached in the competition law assessment to be non-satisfying, the assessment was taken beyond the subject of Financial Fair Play. In this next step a strong relationship was found between Financial Fair Play and the already implemented ‘compensation’ system of the UEFA. It seems that the UEFA completely overlooked the system of compensation, which is a system that in itself already was seen as number one incentive for overinvestment. In the end we were able to state that Financial Fair Play will influence this system and created even bigger incentives for ‘overinvestment’. So, we’ve reached the conclusion to abandon Financial Fair Play in its whole, and tackle overinvestment by dealing with the UEFA compensation system instead.
Preface

I want to take the opportunity to thank everyone that supported me and helped me out throughout the process of writing this thesis, even in the preparatory phase. Special thanks goes out to my family and friends that always kept me motivated when it was needed, but also saved me from overdoing it once in a while.

Furthermore I want to thank my thesis supervisor Professor Pierre La Rouche for helping me with structuring my thesis, for the good advice he gave me throughout the process and for the guidance he gave me with shaping as well as solving the problems I stumbled upon during writing.
Abbreviations

EU European Union
TFEU Treaty on Functioning of the European Union
UEFA The Union of the European Football Associations
FFP Financial Fair Play (regulations/rules)
ECJ Court of Justice of the European Union
ECA European Club Association
FIFpro Fédération Internationale des Associations de Footballeurs Professionnels
1 Introduction

1.1 Background information on Financial Fair Play

Since the last few decades contemporary European football (soccer) has grown to be a huge industry. According to David Lue (et al.), professional football does ‘live up to the capitalist ideal; that if there is money to be made, someone will find a way to make it’. Nonetheless, in the light of the present financial crisis, extensive discussions have been held within The Union of the European Football Associations (UEFA) about the fact that, despite a constant cash flow, the majority of clubs participating in the top of Europe's divisions and leagues are actually loss-making (56% in 2010, 55% in 2011), while 36% of the remaining clubs reported a negative equity in 2010 (38% in 2011).

According to van Dijk this is the case simply because the football industry can be characterized by a ‘surge in money in circulation, observable by the growing revenue streams for “large income” clubs, higher transfer fees and salaries for players, and net losses increasing every year despite the income growth’. Therefore, the UEFA considered that guidelines are called for as a reaction to the alarming trends in recent years and actually thought about different cost control mechanisms in order to solve this problem. Already in 2004 the UEFA implemented the so called UEFA license for European football clubs wanting to participate in the European prestige club competitions (Champions league, Europa league). In order to obtain such a license the clubs need to comply with a set of minimum criteria within the UEFA Club Licensing system on the areas of 1) sporting, 2) infrastructure, 3) personnel, 4) legality and 5) financial matters. However, relying heavily on the financial criteria the UEFA extended the Club Licensing system by introducing the UEFA Financial Fair Play (FFP) regulations in 2010. According to Andreas Stroucken these FFP rules are essentially ‘adding requirements concerning solvency and financing’. The emphasis of the UEFA Financial Fair Play

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Andreas Stroucken, 'UEFA Financial Fair Play: the savior of football or the road to the next Bosman-ruling?' (Lund University Department of Law, 2013) [5] <http://www.lunduniversity.lu.se/o.o.i.s?id=24965&postid=3814388>  
Stroucken, 'UEFA Financial Fair Play' (n 5) [5].
regulations is situated around the so-called "break-even" requirement as a core criteria. On basis of this requirement clubs must take into account that the relevant expenses cannot exceed relevant incomes (in excess of the acceptable deviation).9

The question of what exactly are “relevant” expenses is best answered by van Dijk in his thesis on *Scoring in the European Football Market under Financial Fair Play regulation*. In his explanation of the expenses within the European Football Market he states the following:

Relevant expenses consist of cost of sales, employee benefit expenses and other operating expenses, cost involved with retaining or acquiring players registrations, finance cost and dividends. (...) The break-even requirement only applies to the former specifications, since these are good expenditures.10

Noteworthy about the so called “good” expenditures is that this system of expenses under the UEFA Financial Fair Play regulation is made in a way that it does not disadvantages clubs without external investors (and thus less likely to be wealthy) in complying with the core criteria of the regulation, this break-even requirement.11

This is completely in line with the overall objectives FFP; long-term health and viability of the football market, integrity in competitions, and to stimulate investments in youth programs and sports infrastructure.12 Michel Platini, the president of the UEFA himself, confirmed this notion by stating that the Financial Fair Play concept;

(...should not be seen as a call for austerity and a return to the budgets of old. Football moves impressive amounts of money and that is a good thing. Nor is it a question of seeking a utopian distribution of wealth. There have always been clubs that are richer than others and there doubtless always will be. All we want is for clubs – richer and poorer alike – to spend no more than they earn and to balance their books, this being the only sure way for them to survive.13

However, since the so called “Bosman-ruling” of the ECJ it has been clear that sporting rules ‘governing the economic aspects of sport’14 are highly sensitive topics and can actually be challenged

10 van Dijk, ‘Scoring in the European Football market’ (n 6) [6-7]
11 Ibid., for the ‘break-even requirement’ also see ‘Club Licensing and Financial Fair Play Regulations’ (2012) [Part III, Articles 60-63]
12 Stroucken, ‘UEFA Financial Fair Play’ (n 5) [10]
14 Ibid.
under European Law, especially (but not solely) the competition provisions of European law, currently regulated in Articles 101 TFEU and 102 TFEU. Article 101 (1) of the TFEU prohibits ‘all agreements (...) 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’. However, there are some possible exceptions under Article 101 (3). Furthermore it is Article 102 of the current TFEU that states that ‘any abuse by one or more undertakings of a dominant position (...) shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States’.

1.2 Problems of Financial Fair Play

It is exactly under the above stated provisions that in May of the year 2013 Jean-Louis Dupont, the lawyer that actually was successful in challenging contract laws in football in the famous Bosman case in 1995, again brought a claim before the European Commission challenging the UEFA Financial Fair Play regulation on behalf of a Belgian Football agent, Daniel Striani (simply because football clubs themselves are restricted from challenging the FFP regulation in an easy manner). Dupont himself claims that Financial Fair Play in its current form will breach the competition provisions of EU law. As he said in a column in the Wall Street Journal the UEFA Financial Fair Play regulation is ‘an agreement whereby industry participants jointly decide to limit investments’ and thus likely ‘constitutes collusion and hence a violation of EU competition law’.

Professor Tor G. Jakobsen takes this argument even further by describing the UEFA on basis of “The Leviathan”, a book written by Thomas Hobbes, stating that the UEFA is reinforcing their status as ‘an absolute ruler who could dictate people around and enforce his will as he pleased’. However, in their way to a renewed status, the new FFP Regulations contain some significant flaws according to Jakobsen. It is mainly the fact the Financial Fair Play actually favours the ‘rich’ and ‘well established’ clubs that worries Jakobsen the most. In a given example to illustrate this problem Jakobsen states that ‘the four English clubs Chelsea, Arsenal, Manchester United and Liverpool had

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16 Ibid. art. [102] at [89]
20 Ibid
achieved a seemingly unbreakable top-4 position the Premier League.\textsuperscript{21} This resulted in the fact that year after year it were just these top-4 Premier League teams that were qualified for the UEFA Champions League, thus getting more money from merchandise, television rights etc. This created a gap between these four clubs and the rest of the league, which was only possible to overcome by getting involved with foreign investors.\textsuperscript{22} Since this situation is likely to affect competition at least to some extent, it is definitely necessary to look at this problem closer in the course of this research.

It is especially the earlier discussed break-even requirement (as the core of the FFP Regulation) that extents this problem even further according to Dupont himself. According to Dupont the break-even requirement is ‘making things even less equal’.\textsuperscript{23} In this he is supported by a variety of academics with an interest in the problems arising from football among others Stefan Szymanski, author of \textit{Soccernomics}. On the notion that the break-even requirement is making (some) clubs richer, Szymanski explains that ‘this is not a legitimate goal under European [e.d] Competition Law’.\textsuperscript{24} Within European Competition Law ‘the objective [always] must be in some way to better serve the consumers, even if better financial outcomes are a by-product’.\textsuperscript{25} This is certainly not the case with the FFP Regulations as implemented by the UEFA according to Szymanski. According to Szymanski there even is ‘a real danger that FFP will undermine the long-term success of European competition’.\textsuperscript{26} Again the disturbance of competition seems to be the core of the problem at hand which should be touched upon in more detail in the course of the research.

The European Commission itself does not support the view of Dupont and the other academics at all. The Commission actually wrote to Michel Platini, the president of the UEFA, to state that they welcomed the so called “break-even” rule.\textsuperscript{27} The UEFA itself even acknowledges the fact that indeed the break-even requirement will ‘lead to fewer transfers, and will probably reduce wages too’.\textsuperscript{28} This is in fact the main reason of Duponts’ to challenge of the FFP Regulations, since this will have an impact on the business of his client. However, the stated aims of the FFP were discussed within the European Commission and the principles behind it were found consistent with the aims and objectives of current EU policy. The Commission found that FFP must be supported on the

\begin{footnotesize}
\begin{enumerate}
\item Ibid\textsuperscript{21}
\item Ibid\textsuperscript{22}
\item Matt Slater, ‘How Bosman’s lawyer is plotting another football revolution’ (October 1, 2013) [BBC Sport] <http://www.bbc.com/sport/0/football/24333604>\textsuperscript{23}
\item Ibid\textsuperscript{24}
\item Ibid\textsuperscript{25}
\item Ibid\textsuperscript{26}
\item Jean-Louis Dupont, ‘Football’s Anticompetitive Streak’ (2013) (see 18)\textsuperscript{27}
\item Matt Slater, ‘How Bosman’s lawyer is plotting another football revolution’ (October 1, 2013) (see 23)\textsuperscript{28}
\end{enumerate}
\end{footnotesize}
grounds that it is a proportional measure, in other words the Commission was convinced that FFP is ‘the least harmful way of fixing’\textsuperscript{29} the problems in contemporary European football.

1.3 **Goals of Research**

With the Commission in favour of the FFP Regulation, the process of Duponts’ challenge is unlikely to be an easy ride and could take a number of years to conclude. Therefore the purpose of this research is to analyse the compatibility of the UEFA Financial Fair Play (FFP) regulation with European Union Law, and then especially the competition provisions as laid down in Articles 101 TFEU and 102 TFEU. This will most likely result in an essayistic text, or to be more specific in a research based literature report. However, the text is not solely meant to be descriptive. The purpose is to also convince the reader of a certain position by comparing all relevant (scientific) publications used within the research in a critical manner. In the end it is the intention to reach an informed and well-reasoned conclusion on the issues arising out of the relationship between European Competition Law and the UEFA Financial Fair Play Regulations (FFP). Although somewhat unlikely, it perhaps is even possible to discuss a possible solution to the problems arising out of this relationship (although this should merely be seen as food for thought, not as a solid solution).

Furthermore, if in the course of the research this seems plausible, this research can result in a kind of advisory towards the key persons (or institutions) involved in the case on which this actual research is based. Furthermore I want to state specifically that these research goals are not exhaustive, it is possible that new goals turn up in the course of the research in order to keep the end result satisfying.

1.4 **Methods**

The general method used in this research project is a traditional legal based method;

**Literature study;** in the first phase of this research project it is necessary to conduct a literature study on a number of core concepts related to the main research question (as well as its sub questions). Examples of such core concepts are the “break-even requirement”, “large-income clubs”, “relevant expenses”, “acceptable deviation” and “FFP” as such. This must lead towards clear and precise definitions, which are ought to be used as such in the course of my current research. Within this analysis of the core concepts it is especially the heavily discussed “break-even” requirement, being a core criteria of the UEFA FFP regulation as well as being the core criteria in the claim currently brought before the Commission by Dupont, that will be most developed upon.

\textsuperscript{29} Ibid
Furthermore, this will also be the centre of attention because from a legal point of view it is the most complex and interesting requirement in need to be fulfilled by football clubs as such.\textsuperscript{30}

**Legislation/Jurisprudence study:** in this phase of the research, in order to move towards answering the research questions, am advisory upon the given problem, but also being able to interpret the applicable law properly, it is necessary to analyse official materials such as cases, legislation as well as all other valuable official documents. In being able to make such an assessment this research should not solely focus on the applicable regulations, being 101 TFEU and 102 TFEU (or former Articles 81 and 82 EC). A competition law problem within the area of sports or all sports related legal issues pre-Lisbon for that matter, are mostly based upon case law, or as stated by Stroucken, such an issue is ‘primarily based on judge-made law’.\textsuperscript{31} Therefore it is also necessary to analyse the pre-Lisbon case law that is valuable for this research. Relevant cases (thus relevant for this research) are for example (among others) “Meca-Medina”\textsuperscript{32} and “Wouters”\textsuperscript{33}.

**Interpretation/Conclusion:** purpose of the third and last phase of this research is to combine all knowledge coming from the first two phases of the research and hold them directly against the situated problem at hand. In this way it should be possible to give answer to the questions determined further on and thus draft a ‘conclusion’ upon the specific problem.

### 1.5 Theoretical Assumptions and Conceptions

Since in this research we are analysing a (problematic) relationship between European Competition Law and the UEFA Financial Fair Play Regulations (FFP), it is necessary (in order to form a framework of theoretical conceptions) to identify the cores of what we need to know from both of them.

As stated before it is specifically (but not solely) the competition provisions of European law, currently regulated in Articles 101 TFEU and 102 TFEU that are important for the course of this research. The reason why only Articles 101 and 102 TFEU are mentioned is because the actual third option within European Competition Law, the so called Merger Control Regulation, is not relevant in the course of this research. In the introduction of this proposal both articles (101 & 102 TFEU) were already solely touched upon as well in form as in content. But what do we really need to know about them in order to conclude the research as it was ought to be?

\textsuperscript{30} Stroucken, ‘UEFA Financial Fair Play’ (n 5) [7]
\textsuperscript{31} Stroucken, ‘UEFA Financial Fair Play’ (n 5) [14]
\textsuperscript{32} See Case C-519/04 P Meca-medina and Majcen v Commission [2006] ECR I-7006
\textsuperscript{33} See Case C-309/99 Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten [2002] ECR I-1577
Well, in short we must know that article 101 TFEU lays down rules for the application of the provisions concerning agreements, decisions by associations of undertakings and concerted practices which has an effect on trade between Member States and may (or may not) restrict competition. Article 102 TFEU lays down rules for the application of provisions on conduct concerning an abuse of dominant position that has an effect on trade between Member States. As we can see both provision rely heavily on the word or concept of ‘trade’. One must know that in the course of this research the concept of trade ‘is not limited to the most usual and traditional idea of simple exchange of goods and services across borders’. According to Lydia Scholz it is ‘a much wider concept including all cross-border economic activity, including for instance the establishment by undertakings of agencies, branches or subsidiaries in other Member States’.

Within the UEFA Financial Fair Play Regulations (the second subject of the relationship), most research revolves around the so called “break-even requirement” as stated before. Therefore it is necessary to recap the goals of the UEFA in order to come towards (at least) some considerations of underlying theoretical conceptions. As stated before the UEFA aims at rebalancing competition and enhancing long-term financial stability in contemporary European football, which is to be reached by use of this “break-even requirement”. Therefore we can state that this research depends mostly upon two underlying theoretical conceptions, namely that of competitive balance and that of financial stability.

The concept of Competitive balance as theoretical concept within sports was first identified by Simon Rottenberg around 1956. Although his work focussed solely upon baseball, his theory of competitive balance is perfectly applicable to other sports as well. The whole concept is situated around a sports team’s need for competitive balance. According to Christopher Sodemann it is ‘the difference of the quality of play’ that must not become ‘too great or the contest will lose the element of uncertainty which makes it valuable to the spectators’.

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38 Ibid.
39 Ibid.
40 Ibid.
order to ensure long-term public interest in the different leagues\textsuperscript{41} and therefore a very important concept underlying or research on the UEFA Financial Fair Play Regulations.

The concept of Financial Stability seems somewhat more straightforward. However financial stability is not easy to define.\textsuperscript{42} It consists of a few key concepts\textsuperscript{43} that together can be developed into a working definition of financial stability. According to Schinasi the concept of financial stability can be broadly thought of in terms of;

(...) the financial system’s ability (a) to facilitate both an efficient allocation of economic resources – both spatially and especially intertemporally – and the effectiveness of other economic processes (...); (b) to asses, price, allocate and manage financial risks; and (c) to maintain its ability to perform these key functions – even when affected by external shocks or by a build-up of imbalances – primarily through self-corrective mechanisms.\textsuperscript{44}

The aspect of financial stability is important in a research concerning the UEFA Financial Fair Play Regulations, simply because of the fact that imposing possible tighter regulations (like FFP seems to be), while maintaining the long-term objective of financial stability, can have its implications on contemporary European professional football (perhaps even unintentionally).\textsuperscript{45}

1.6 Research Questions

Towards an assessment of the above stating problem formulation and fulfilling the aim of the research at hand, answer must be given on the following question:

“To what extent are the UEFA Financial Fair Play Regulations (FFP) compatible with the competition provisions of European Law, regulated in Articles 101 TFEU and 102 TFEU?”

In order to answer this main question a variety of sub-questions need to be asked on basis of the methodological “step-by-step” approach inherent to any possible European Competition Law problem:

1.\textit{In which ways it is possible, as a legal person, to be qualified under European Union Competition Law?}

\textsuperscript{44} Schinasi, ‘Defining Financial Stability’ (n 34) [8]  
\textsuperscript{45} Henning Vöpel, ‘Do we really need Financial Fair Play’ (n 27) at [59]
2. How can the Union of the European Football Associations (UEFA), as a sports association that adopted the Financial Fair Play regulation, be qualified under European Competition Law?

3. How can the relevant market be defined in the application of the UEFA Financial Fair Play rules against European Competition Law?

4. In how far one can state that with the Financial Fair Play Regulations, as implemented by the UEFA, trade between the Member States of the European Union is affected?

5(1). To what extent does the UEFA Financial Fair Play (FFP) Agreement entail a restriction of competition under Article 101 TFEU?

5(2). If there is likely to exist any possible restriction of competition under 101 (1) TFEU, can such a restriction be saved under the Block Exemptions or under 101 (3) TFEU?

6(1). Under what conditions can the UEFA Financial Fair Play (FFP) Agreement lead towards an abuse of dominant position to restrict competition under Article 102 TFEU?

6(2). If there is likely to be an abuse of dominant position to restrict competition under Article 102 TFEU, are there any defences available?

The further analysis is divided over three main steps in the process, namely the first step including qualification, relevant market and the effect on trade between Member States (questions 1 to 4), the second is the analysis under article 101 TFEU (question 5) and the third step is analysis under 102 TFEU (question 6). Furthermore, at some points in the process more concepts will be explained generally in order to give better answer to some of the research questions. This is the ought assessment at the start of the research, again if further questions (or less) are needed to ask in order to complement or complete the research, this will be made available in the course of the research.

2 First steps of the process

2.1 Qualification under European Competition Law in general
In this first step of the analysis the first question stating; ‘in which ways it is possible, as a legal person, to be qualified under European Union Competition Law?’ is answered. In this part the general ways of qualification under European Competition law are explained in detail.

For the qualification under European Competition law we first should turn to Article 101 (1) TFEU, where it states that the article applies to ‘agreements and concerted practices between undertakings and to decisions of associations of undertakings’.\(^{46}\) So as acknowledged by Okeoghene Odudu we can define two addressees within Article 101 (1) of the Treaty on the Functioning of the European Union, namely; (1) undertakings as well as (2) associations of undertakings. Furthermore also Article 102 TFEU (which is also a significant point of discussion within the whole analysis of FFP) refers to the concept of undertaking in the sense of; ‘abuses committed by dominant undertakings’.\(^{47}\) However, what the Treaty does not define is what an undertaking (or the latter) actually means.\(^{48}\) According to Richard Whish and David Bailey in their book *Competition Law* the European Courts were asked for clarification upon the meaning of undertaking\(^{49}\) (association of undertakings is discussed later within this part of the analysis).

Odudu as well as Whish and Bailey take the Höfner and Elser v. Macroton GmbH case\(^{50}\) as point where the basics of defining what exactly is an undertaking started by the European Court of Justice.\(^{51}\) Within this case the Court stated that ‘the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed’.\(^{52}\) Within Pavlov\(^ {53}\) added to this is that ‘offering goods or services on given market’ must also be held as being an economic activity. Perhaps even more interesting for the course of analysis of UEFA Financial Fair Play under European Competition law is the conclusion that the Court reached in the so called Wouters\(^ {54}\) case. Within this case it is specified to what kind of activity by an undertaking Competition Law does not apply, thus ways of being able to dodge the bullet in an early phase so to speak. The Court (ECJ) in Wouters stated that competition rules within the Treaty;

\(^{47}\) Richard Whish & David Bailey, ‘Competition Law’ Oxford University Press UK [Chapter 3] [83]
\(^{48}\) Ibid.
\(^{49}\) Ibid.
\(^{50}\) See Case C-41/90 Höfner and Elser v Macroton GmbH [1993] ECR I-1979
\(^{51}\) Odudu, ‘The Meaning of Undertaking’ [212], Whish & Bailey ‘Competition Law’ [84]
\(^{52}\) Whish & Bailey [84]
\(^{53}\) See Case C-180/98 Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten [2000] ECR I-06451
\(^{54}\) See Case C-309/99 Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten [2002] ECR I-1577
‘do not apply to activity which, by its nature, its aim and the rules to which it is subject does not belong to the sphere of economic activity... or which is connected with the exercise of the powers of a public authority’.  

In Wouters two kinds of activities are thus excluded from falling under European Competition law, namely; (1) activities that are not economic and (2) activities connected with the exercise of the powers of public authority. In order to fall under the first (economic activity) no specific intention to earn profits with the activity is required. As we can retrieve from the Pavlov case economic activity extends to a wide variety of activities. According to Odudu there is a third addition to be made to the concepts of offering goods or services. However, market regulation (which is the third addition), which is not about offering goods or services, can not be seen as a pure economic activity. But, even when it is not to be seen as engaging in economic activity, critics still believed that those engaged in it act as undertakings and thus are subject to Community competition law.

This is simply the case because when one talks about market regulation as a form of activity that falls under the scope of European Competition Law, we are actually talking about the exercise of public authority, the performance of ‘state-like functions’ as it is called by Odudu. As we can recall this was the second ‘activity’ in the Wouters case were Competition Law was not applicable. But it is not as simple as that; As we can recall from the basic definition of an undertaking it describes that ‘any entity’ can fall under its scope as long as it is engaged in an economic activity. Clearly when the exercise of public bodies reflect market regulation, such bodies will fall outside of the scope of Articles 101 & 102 TFEU. But that it is only the case when such authorities are not participating or competing in the markets themselves. Nonetheless, since the UEFA is nothing near being a public body, there is no need to elaborate much more on this specific topic (it doesn’t apply anyway).

Something slightly different holds up when we talk about so called ‘associations of undertakings’ according to Whish and Bailey, which is the second adressee of Article 101 TFEU. An association of undertakings, unlike the functional activity approach with regular undertakings, ‘does

55 See Case C-309/99 Wouters paras 57
57 Odudu [218]
58 Ibid.
59 Ibid [219]
60 Ibid.
61 ICTtrain, ‘What is an Undertaking?’ [1]
62 Ibid [2].
63 Whish & Bailey [91]
not have to have a commercial or economic activity of its own\textsuperscript{64} to be subject to the Competition provisions of the European Union. For example when we hold this assumption against Article 101 (1) TFEU it follows that ‘Article 101 (1) may be applicable to the decisions of a trade association, even if it does not apply to its agreements’.\textsuperscript{65} According to Whish and Bailey this is simply the case because the association does not go into the agreements as an undertaking.\textsuperscript{66} However, ‘where an association is an undertaking [or to be seen as one, e.d.], an agreement between it and other undertakings may be caught by Article 101 (1)’.\textsuperscript{67} Nonetheless, this does not mean there are no exclusions. As also discussed above on general undertakings, the same approach holds for associations of undertakings when it comes to the exercise of a public body or official authority. It is pointless to re-address the whole functional approach taken there, in my opinion it is more sufficient to end this part of the analysis with the following statement of Whish and Bailey;

‘Just as a ‘functional’ approach should be taken to the concept of an undertaking, so too it may be that a body can qualify as an association of undertakings when carrying out some of its tasks, but not when performing others (for example regulatory supervision on behalf of the state)’\textsuperscript{68}.

2.2 Qualification of the UEFA under European Competition Law

In this second part of our first steps within the analysis the question of qualification of the UEFA under European Competition law is answered. For reference sake this part relates to research question 2, stating; ‘How can the Union of the European Football Associations (UEFA), as a sports association that adopted the Financial Fair Play regulation, be qualified under European Competition Law?’. So basically we are asking the question; is the UEFA an undertaking (or perhaps an association of undertakings)?.

The question if a sports association like the UEFA is an undertaking is best described in paras 47 of the Commission Decision on UEFA’s broadcasting regulations.\textsuperscript{69} In here it is described that within sports and undertaking is an ‘entity engaged in economic activity’.\textsuperscript{70} In that respect there is really no doubt that UEFA, and its member clubs, are undertakings within the meaning of 101 and 102 TFEU. However, it’s not as straightforward as it seems like. First of all most part of the UEFA’s

\textsuperscript{64} Ibid.
\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid.
\textsuperscript{67} Ibid.
\textsuperscript{68} Ibid [92].
\textsuperscript{69} OJ L 171 Commission Decision of 19 April 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case 37.576 — UEFA’s broadcasting regulations) [2001] paras 47.
\textsuperscript{70} Ibid.
activity is not economic, but merely of a sporting nature.\(^{71}\) For example when the UEFA is adopting measures of sporting matters, as being a mere regulator within these actions\(^{72}\) and have nothing to do with economic activity.\(^{73}\) Nonetheless, the UEFA complies with the main condition for being able to be considered as an undertaking; it is involved in economic activity as well. As emphasized by Cherpillod and Pérez the UEFA is for example involved in ‘contracts relating to television rights’, which is to be seen as purely being an economic activity.\(^ {74}\) Very important for the assumption of being an undertaking is the extent that all associations like the UEFA are carrying out these activities themselves.\(^ {75}\) So we can state that the UEFA is definitely an undertaking within the meaning of the European Competition provisions, and then especially Article 101 & 102 TFEU which are the relevant two provision for this research.

Within the same Commission Decision\(^ {76}\) it is also argued that the UEFA should be considered not to being merely an undertaking within the meaning of the competition provisions, but if it can also be seen as an association of undertakings as touched upon within the meaning of Article 101 TFEU. It is Nixon that states that; ‘Indeed, UEFA would be considered to be an association of undertakings’.\(^ {77}\) But once more, it always needs some explanation. As touched upon by Geeraert, and also earlier explained by the words of Whish and Bailey, ‘international sports associations not carrying out economic activities themselves may be considered associations of undertakings’.\(^ {78}\) But what does this exactly mean when we look at the UEFA in specific? Well, the UEFA can be regarded as being an association of undertakings, which is thus capable of acting-anti competitively according to Geeraert, if its members (in the UEFA’s case national federations, football clubs, or even the athletes) are engaged in economic activity.\(^ {79}\) Is this the case with the UEFA as an sports association, are its members engaged in such activities? When we look at the members of an sports associations like the UEFA, I believe that without a single doubt (and without further explanation) we can state

\(^{71}\) Ivan Cherpillod & Juan de Dios Crespo Pérez, ‘Club Ownership’ in Alexander Wild, ‘CAS and Football: Landmark Cases’ (2012) [T.M.C. Asser Press] [Chapter 3] [20]

\(^{72}\) Ibid.


\(^{74}\) Ibid.


\(^{76}\) OJ L 171 Commission Decision, paras 47


\(^{78}\) Geeraert, (2012) [18]

\(^{79}\) Ibid.
that they are all engaged in economic activity. So, this means that the UEFA can be seen as an undertaking, as we have seen earlier on in this part, but further reasoning also showed that the UEFA at the same time can be seen as an association of undertakings within the meaning of the European Competition provisions.

Normally, this is where the reasoning stops, the UEFA is qualified as being both an undertaking as well as being an association of undertakings. There is nothing more to it as we can recall from the general explanation on qualification under European Competition law. However, since the UEFA as an international sports association is such a special entity, it is sometimes referred to as being an ‘association of associations of undertakings’, acting as ‘an instrument of professional clubs’ cooperation’. This perhaps seems very farfetched at first, but the line of reasoning is in fact pretty logical and simple. The line of reasoning also stems from the Commission decision on the UEFA’s broadcasting regulations, but is best explained by Arnout Geeraert;

‘In its ruling in the UEFA Champions League case, the Commission held that, as its membership consists of economic entities (clubs), national football associations are associations of undertakings but are also themselves engaged in economic activities. As the members of UEFA are the national football associations, it is therefore “both an association of associations of undertakings as well as an association of undertakings.”

So, as we have seen in this part on qualification of the UEFA under European Competition law, the UEFA can be qualified as both an undertaking and an association of undertakings and thus falls under the scope of the competition provisions. We have also seen that, as well under the scope of European Competition law, the UEFA can even be referred to as being an ‘association of associations of undertakings’.

2.3 The Relevant Market Definition in general

Within this third part of the process in our analysis of the UEFA Financial Fair Play Regulations possibly violating the European Competition Provisions, after we have concluded that the UEFA qualified as being an undertaking (or association of undertakings), it is necessary to give answer to the question of; ‘How can the relevant market be defined in the application of the UEFA Financial Fair Play rules against European Competition Law?’. Or to be more precise (and perhaps more to the point); ‘What is the relevant market definition within this case?’.

80 Look into the general explanation in part 2.1
81 Geeraert (2014) [19]
82 Cherpillo & Pérez (2012) [20]
83 OJ L 171 Commission Decision, paras 47
84 Geeraert (2014) [19]
As explained by Whish and Bailey to ‘understand what is meant by the market’\(^{85}\) or as we state it the ‘relevant market’, is the key to any analysis of a competition law issue. The reason behind this assumption is best explained in paragraph 2 of the introduction of the Commissions Notice.\(^{86}\) There it states that;

‘Market definition is a tool to identify and define the boundaries of competition between firms. […] The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure’.\(^{87}\)

Within such an analysis of the relevant market definition it is necessary to identify both the relevant product market as well as the relevant geographic market as is explained in above stated citation of the Commissions Notice.

Within the relevant product market it is all about the so called concept of ‘interchangeability’. The most simple view on this concept is given by Whish and Bailey and tells us that ‘where goods or services can be regarded as interchangeable (on basis of product characteristics and intended use), they are within the same product market’.\(^{88}\) Nonetheless, the measurement of the concept of interchangeability can cause at least some problems. For example, as noticed by Whish and Bailey, there may be no or no reliable available data to make an assessment of interchangeability.\(^{89}\) These things must be taken into account when making an assessment of the relevant product market. Another way to approach defining the relevant product market is the SSNIP test (the Small but Significant Non-transitory Increase in Price test), in which we (figuratively) raise the price of the product(s) made by the firm under inquiry and then test if people will switch to other products instead. However, such a reasoning by way of the SSNIP test will likely not work with the ‘products’ as offered by the UEFA, simply because of the special characteristics that these products obtain. Therefore the SSNIP test will likely to be irrelevant for this particular research.

It is the relevant geographical market that is more easy to define. Basically the most easy explanation is to look for an ‘area where the conditions of competition are uniform’ (of course

\(^{85}\) Whish & Bailey (2012) [27]
\(^{86}\) OJ C 372/5 Commission Notice on the definition of relevant market for the purposes of Community competition law (1997) P. 0005-0013
\(^{87}\) Ibid, Introduction, paras 2
\(^{88}\) Ibid. [30]
\(^{89}\) Ibid.
starting with the area where the firm under inquiry operates).\textsuperscript{90} Whish and Bailey put it a bit differently in their parts on the relevant geographical market, they state that in the assessment of a relevant geographic market one searches for;

‘a clearly defined geographic area in which [the product] is marketed and where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated’.\textsuperscript{91}

After having shortly defined what the concepts of relevant product as well as geographical market entail, we can switch to the UEFA and its relevant market definition.

\textbf{2.4 The Relevant Market of the UEFA and its Financial Fair Play Regulations}

In case of the UEFA and the application of European Competition law to its Financial Fair Play rules it is best to start out with an assessment of the relevant geographical market of the Financial Fair Play Regulations than to start with the relevant product market (because of the special characteristics of the products that will need some more explanation).

In our assessment of the relevant geographical market it is important to point out, according to Clinton R. Long, that ‘the FFP rules do not deal directly with competition on the field’.\textsuperscript{92} FFP is instead ought to govern what Long calls ‘financial competition’, which can be simplified to ‘what clubs can spend on their players’.\textsuperscript{93} With this rules set up by an international (European) body like the UEFA, it seems only logical that all its member are obliged to abide by the same rules.\textsuperscript{94} All UEFA members must abide by the same rules applicable upon ‘finances, player transfers and signings and so forth’.\textsuperscript{95} This means that the conditions for competition in our sketched situation are homogeneous across the influence of the UEFA, which is one of the concepts to look at when defining our relevant geographical market. This however, is in strong contrast with the fact that the ‘level of play on the field and the quality of competition in each league’\textsuperscript{96} are not equal (as we can recall from the introductory part as one of the supposed problems of FFP). In spite of this contrast it is still logical to conclude that the relevant geographical market consists of the members of the UEFA

\textsuperscript{90} Pierre Larouche, ‘European Competition Law’ [2013-2014] [Tilburg University], Slides Lecture 4 [5]
\textsuperscript{91} Whish & Bailey [39]
\textsuperscript{93} Ibid.
\textsuperscript{94} Ibid.
\textsuperscript{95} Ibid
\textsuperscript{96} Ibid.
and therefore those countries are in the geographical market of which their national football associations are within the UEFA.

Normally this will mean that we have an European wide relevant geographical market (since the UEFA is a European wide association). However, besides having some non-Union (but still situated in Europe) countries that participate within the UEFA, like Switzerland, there are also a few cases that need special attention. Some members of the UEFA are (geographically seen) being argued to fall outside of Europe, such as Kazakhstan and Azerbaijan\(^\text{97}\) that are located north of the ‘official’ borders of Europe and Asia. However, both these countries are member of the UEFA and thus clearly falling inside the scope of our relevant geographical market definition. Sort of the same holds for countries such as Turkey, Armenia and Israel.\(^\text{98}\) These countries, normally not seen as being European countries, all have small parts geographically seen situated within the borders of the European continent and therefore had the opportunity to choose whether to be member of the UEFA or to be member of the Asian football association. Since they all chose to be part of the European association, the UEFA, they also fall within the scope of our relevant geographical market definition. Thus the relevant geographical market in our case is situated in but not limited to the geographical borders of Europe as a continent, it are these members that extent it even further than that.

In completing our competition law analysis, the next step is to define our relevant product market definition. With the Financial Fair Play Regulations as a starting point it is already possible to conclude that we cannot make an assessment of just one relevant product market. This, according to Long, is because of the fact that we have three different possible parties being able to challenge the FFP rules on basis of a possible competition law violation,\(^\text{99}\) all dealing with different ‘products’ so to speak. The three main parties subject to our analysis of the product market (and thus being able to challenge FFP) are clubs,\(^\text{100}\) players and sponsors (or people representing one of the three main parties, like an agent as is Daniel Striani in our case to make a more easy challenge). All three subjects have their own relevant product market in our analysis, which thus will be threefold.

Football clubs, which is the first subject in our analysis of our threefold relevant product market definition, have as their main product their players.\(^\text{101}\) As typified by Long, players are their main products simply because when acquiring new players they have a certain amount of interchangeability in the sense of Whish and Bailey. ‘If a club cannot acquire one professional player

\(^{97}\) Member information taken from UEFA website \(<\text{http://www.uefa.com/memberassociations/}>\)

\(^{98}\) Ibid.

\(^{99}\) Clinton R. Long, ‘Promoting Competition or Preventing it?’ (2012) [86]

\(^{100}\) Note that in the introductory part of this thesis it was stated that it is difficult for clubs themselves to bring challenges to FFP, however this was not rendered as being impossible.

\(^{101}\) Clinton R. Long (2012)[87]
that it wants at the price it is willing to pay, it seeks another who meets its requirements’. Nonetheless, although highlighted as being a necessary condition by Whish and Bailey, the concept of interchangeability between players is not based on specific terms or aspects. Football players cannot be compared to banana’s coming from different factories but still containing the very same product characteristics. Football players are all unique human beings for that matter. So, their degree of interchangeability depends on other multiple factors such as their ‘skills, position or price tag’ but sometimes also something more personal such as preferences (people not having any affiliation with a certain club whatsoever will never play there). But, even if not based on specific terms, a certain degree of interchangeability exists, and therefore we should define the product market for clubs themselves as consisting merely out of players.

The next subject of analysis, being a ‘product’ themselves, are the players who have their own specific relevant product market, as is indicated by Long. Same kind of analysis as the one we made for the clubs and their products must be made here. In light of defining the product market, we must first ask the question what they actually do? Of course they play football, but in light of a competition law analysis we can state that they provide services (to a certain club) with which in exchange they get money. To this extent it is possible to turn our previous reasoning the other way around. Depending on certain factors of interchangeability like ‘price, location, management and other issues’ players will move around from one club to another if they want to at least. As stated by Long; ‘if a player finds that a club cannot meet his needs, he can find another club that does’. It is therefore only logical to state that for a player the relevant product market consists out of the clubs who actually pay for their services. Although Long limits the scope solely to clubs that are member to the UEFA (which is also the most logical scope for the problem at hand), problems with FFP can also arise out of transfers of players from an UEFA member club to a non-member club or vice versa in my opinion.

The third subject of our threefold analysis of the relevant product market, sponsors, has a slightly different approach. While the players product market is about from who they get paid and while the clubs product market is about who they pay, the sponsors product market is entirely about what they are paying for. In the case of the sponsors they are paying mostly for things such as

102 Ibid.
103 Ibid.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid. [88]
publicity and visibility. The interchangeability again lies within non-specific terms since there are no real uniform product characteristics. Of course it is based upon terms such as price or branding opportunities, but these are not completely uniform. This is best illustrated by Long who states that; ‘sponsoring Manchester United will bring more visibility and cost more to a sponsor than sponsoring a small club from Malta.’ Although the amount of interchangeability depends strongly on the measurement of such concepts, we again can state that at the least there is an amount of interchangeability. Much like with football clubs and their products, it is sponsors that are equally capable of sponsoring a certain club that are interchangeable with each other for that matter. Generally speaking we can state that the relevant product market in the case of sponsors are clubs that take their money in exchange for sponsorship. Again this is limited by Long to clubs that are members of the UEFA, which is in this case the right thing to do in my opinion.

Thus, in the end we can state that we have a threefold relevant product market definition, in our analysis of the UEFA Financial Fair Play Regulations against the European Competition provisions, consisting out of relevant markets for clubs, players and for sponsoring. With the analysis of the relevant market definition (the geographical market as well as the relevant product market) finished, it is possible to move to the next step in the competition law analysis on the UEFA Financial Fair Play rules.

2.5 Effect of Financial Fair Play on trade between Member States

In this last part of our first steps in the process, after having done the qualification of the UEFA under European Competition law as well as having defined the relevant market definition, it is time to answer question 4 which states; ‘In how far one can state that with the Financial Fair Play Regulations, as implemented by the UEFA, trade between the Member States of the European Union is affected?’ To be more precisely we can ask ourselves; ‘Will Financial Fair Play affect inter-Community trade?’

One of the main conditions of having an effect on (or for affecting) trade between Member States is the presence of economic activity. In the qualification part of the UEFA under European Competition law we have seen that indeed the sports association is engaging in economic activity. However, this is not enough to qualify as affecting inter-Community trade within this specific case.

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108 Ibid.
109 Ibid.
110 Ibid.
111 Andrew Nixon, ‘the new Bosman?’ (2014)
112 Ibid.
We are investigating a very specific part of the UEFA, namely their implemented Financial Fair Play rules. So therefore we must ask ourselves, in order to be possibly qualified as affecting trade, if FFP is in itself an economic activity? One of the people that answers this question is Johan Lindholm. He states that ‘it is clear that the Financial Fair Play rules regulate economic activity and consequently fall within the scope of E.U. law as they specifically target professional and semi-professional football’.\textsuperscript{113} Reason that the scope of target is limited to professional and semi-professional players is, according to Lindholm, the fact that Financial Fair Play as a set of rules has the intention (one of many) to reduce the salaries that clubs pay their players.\textsuperscript{114} Since players below the level of semi-professional are not paid for their delivered services they do not fall under the scope of our problem.

After having established that Financial Fair Play is in its essence an economic activity, it remains if it is possibly affecting trade between the Member States of the European Union (or beyond this as we can recall from our relevant geographical market definition)? Andrew Nixon also asks himself this question and has an answer to it as well. In his article he states that the answer to the question will most certainly be yes. Simply because of the fact that it is ‘generally accepted that rules adopted by international sports governing bodies [like the UEFA] will affect trade when an economic activity is involved’.\textsuperscript{115} It is thus the fact that Financial Fair Play is in itself an economic activity that it is possibly hindering what we call trade between Member States or inter-Community trade.

You can possibly compare FFP with the anticompetitive effects of salary caps in North American sports as explained by Lindholm.\textsuperscript{116} Many of the arguments used to define these North American salary caps as being anticompetitive and thus affecting inter-Community trade can be equally applicable to the UEFA’s Financial Fair Play regulations.\textsuperscript{117} It is Jeffrey E. Levine back in 1992 that did research on the North American salary caps and thus indirectly gave us the arguments that we can apply to FFP.\textsuperscript{118} According to Levine these salary caps were affecting trade simply because of the effects they had on for example player salaries and player mobility.\textsuperscript{119}


\textsuperscript{114} Ibid.

\textsuperscript{115} Ibid.

\textsuperscript{116} Ibid.

\textsuperscript{117} Johan Lindholm, ‘The Problem with Salary Caps’ (2011) [197]

\textsuperscript{118} Ibid.


\textsuperscript{119} Ibid.
When we apply these arguments really shortly to Financial Fair Play like Andrew Nixon does, we can state that ‘FFP will inevitably have an impact on the transfer market and player trading between member states’\(^{120}\) within the European Union. So, we can definitely state that the Financial Fair Play regulations are affecting trade between Member State one way or another. In what specific ways it affects the trade between Member States will be discussed in more detail within our assessment of Financial Fair Play under the Competition provision which is the next big step to take in the process of this competition law analysis. Furthermore, within this next step it will be discussed if the rules are not only affecting trade but also are in fact violating the European Competition provisions relevant to these kind of issues, namely Articles 101 and 102 TFEU.

3 UEFA Financial Fair Play under Article 101 TFEU

3.1 Financial Fair Play as possible restriction under Article 101 (1) TFEU

\(^{120}\) Andrew Nixon (2014)
In our assessment of the UEFA Financial Fair Play rules against the Competition Provisions of the European Union, and thus to ‘determine if the FFP rules violate’ the relevant Treaty Articles, noticed must be that all the article’s requirements (which accounts for both 101 and 102 TFEU) must be assessed separately in order to come to a proper analysis. In this part of our research TFEU Article 101 (1) is held against the Financial Fair Play regulations. Before we begin the actual analysis let us recap (although in more detail as in the introduction) what Article 101 (1) TFEU precisely states in order to divide it into the different requirements; Article 101 (1) states that:

‘The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

When we take a good look at the Treaty Article in order to make an assessment of the different requirements of 101 (1), we can actually split the Article up in three main conditions. Namely that of a prohibition of A) ‘all agreements between undertakings, decision by associations of undertakings and concerted practices’ which B) ‘may affect trade between Member States’ and which C) ‘have as their object or effect the prevention, restriction or distortion of competition’. This separation of the main conditions of Article 101 (1) TFEU, as also made by Long, is completely in line with the judgment as made in the so called ‘Meca-Medina’ case. The Meca-Medina judgment is actually ‘the first judgment in which the Community Courts applied Articles 81 and 82 EC (note: now articles 101 and 102 TFEU) to a sporting rule adopted by a sports association relating to a

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121 Clinton R. Long, ‘Promoting Competition or Preventing it?’ (2012) [88]
122 Ibid.
124 Long (2012) [88]
sporting activity’. It is not simply the case that the above made separation was also made in the Meca-Medina judgment, it is the general line of reasoning that makes it as being a valuable guidance in our assessment, by way of a methodological approach, of sporting rules (like FFP) under the European Competition provisions (which is in this part 101 (1) TFEU). It is actually the step process as followed by the Commission in the Meca-Medina judgment, that we are following for the most part since the beginning of this research. The separation of the main conditions is necessary to establish the second step of the Meca-Medina judgment, namely to find out if the Financial Fair Play regulations can be seen as a restriction of competition under Article 101 (1) TFEU.

Firstly, it is necessary to establish if the UEFA FFP rules can be considered as an agreement between undertakings, decision by an association of undertakings or as concerted practice. Fulfilling either one is sufficient in order to fall under the scope of 101 TFEU, it’s not a cumulative process. Normally it is not even necessary to talk about the deviation between the three ‘options’, for the sake of a competition law analysis as we are making within this research it suffices to simply ask the question; ‘is there an agreement between undertakings?’ or in our case; ‘is Financial Fair Play to be considered as an agreement between undertakings?’.

It is the SA Hercules case in which the Court lays the minimal ground rules for something to be seen as an agreement between undertakings. Within this case it is stated that for an agreement to actually fall under the scope of Article 101 TFEU ‘it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way’. Question in our case is thus if all the relevant undertakings expressed their joint intention in implementing the Financial Fair Play Regulation into the market of contemporary European football. As stated by Long all undertakings in question ‘unanimously agreed to the rules which would govern club’s financial behaviour’. The relevant undertakings in this case are also summed up by Long; The ‘UEFA sponsoring the rules, the European Club Association (representing the clubs), the European Professional Football Leagues (representing the national associations) and FIFPro (representing the players)’. It is clear that Financial Fair play is basically to be seen as a joint agreement between all

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127 Ibid.
129 Ibid. [256]
130 Clinton R. Long (2012) [89]
131 Ibid.
relevant undertakings as stated above, who (all) have expressed joint intention to behave themselves in a certain way on the contemporary European football market.

Normal second step would be establishing if Financial Fair Play affects trade between Member States. However, there already is a general part explaining the big picture of Financial Fair Play affecting trade between Member States. For a sufficient assessment of this part under Article 101 (1) TFEU there is no need to say much more than we have initially done. To be more explicit; stating that ‘FFP will inevitably have an impact on the transfer market and player trading between member states’\(^{132}\) is enough to establish a possible violation at the end of our assessment of 101 (1). As we have seen, it can hardly be disputed that Financial Fair Play is likely to affect trade one way or another,\(^{133}\) simply because it is;

‘possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States’.\(^ {134}\)

It is the potential character of affecting trade between Member States that even is enough for determining a possible violation of Article 101 (1) in the end. We can state that the break-even requirement may have a potential ‘influence […] on the pattern of trade between Member States’\(^ {135}\) (note that the condition of ‘affecting’ trade between Member States is usually unproblematic anyway).

After having established that Financial Fair Play can in fact be seen as an agreement, and after having illustrated that FFP can (potentially) affect trade between Member States by way of the break-even requirement, we need to establish if Financial Fair Play has as its ‘object or effect the prevention, restriction or distortion of competition’,\(^ {136}\) since those are the aspects that potentially can make FFP (as a set of ‘sporting’ rules) prohibited within the meaning of Article 101 (1) TFEU. This can be done in two ways; in the next part we will try to do this on basis of the so called ‘Wouters-test’; in the part after we will use the common mode of analysis under Article 101 (1) TFEU.

### 3.2 Financial Fair Play in light of the ‘Wouters-test’

\(^{132}\) Andrew Nixon, ‘the new Bosman?’ (2014)

\(^{133}\) Stroucken ‘UEFA Financial Fair Play’ (n 5) (2012) [26]

\(^{134}\) Ibid. [249]

\(^{135}\) Société Technique Minière [1964] [249]

The so called ‘Wouters’ case was used as a reference within the famous Meca-Medina judgment, and proved to be ‘of profound importance to the future treatment of sport under EU Competition law’. In the Wouters case, which actually had nothing to do with sports at all, it was established that in determining if a rule imposes a restriction of competition within the meaning of 101 TFEU (or even an abuse of dominance within the meaning of 102) one needs to take into account the following factors, which are needed to be assessed one by one;

1) the overall context in which the rule was adopted or produces its effects and its objectives;
2) whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and
3) whether the rule is proportionate in light of the objective pursued.

In defining the overall context of the UEFA Financial Fair Play rules it is first necessary to analyse the objectives of FFP as such. Since we’ve took the break-even requirement as core concept of Financial Fair Play as ground for the general introduction under Article 101 (1) TFEU in the previous part, it is only logical that in getting a coherent assessment to take the break-even part as a foundation again. However, that is exactly where an assessment of Financial Fair Play under the ‘Wouters’ and ‘Meca-Medina’ principles become highly problematic. The fact that the break-even requirement is the core concept of FFP, only emphasizes the fact that the UEFA Financial Fair Play regulation is of a purely economic nature. This notion is even being verified when Henning Vöpel start his analysis of FFP within the scope of ‘Wouters’ by determining the four main objectives of UEFA, which all seem (at least to some degree) to be economic objectives.

- to protect the integrity and smooth running of the UEFA club competitions;
- to encourage clubs to operate on the basis of their own revenues;
- to encourage responsible spending for the long-term benefit of football;
- to protect the long-term viability and sustainability of European club football.

So, why does this make an assessment of Financial Fair Play under the Wouters principles highly

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137 Geeraert, ‘Limits to the autonomy of sport’ (2012) [20]
139 Henning Vöpel (2013) [23-24]
140 Ibid. [24]
141 Ibid.
problematic? Or in other words, why is the reasoning of Henning Vöpel,\textsuperscript{142} who does the complete Wouters-test on the FFP rules, completely off?

Well, the answer is actually quite simple. Both the Wouters and Meca-Medina case law is about reconciling professional rules that pursue a ‘non-economic’ objective under the scope of competition law. In Wouters the case is about the integrity of the legal profession (nothing economic about this) and in the case of Meca-Medina the whole discussion is on the fight against doping (sports? yes! ;economic? definitely not). It is exactly the ‘non-economic’ nature of the objectives in both the Wouters and Meca-Medina case law that makes the principles of the ‘Wouters-test’ applicable. Rules with a non-economic nature are difficult to put in the box we call ‘competition law’, therefore they are likely to fall outside of the boundaries of the box we’ve created with the competition law rules (in this case 101 (1) TFEU). On the other hand, in the case of Financial Fair Play we can state that it does pursue financial objectives (as we can retrieve from above) and thus it is the textbook example of something that fits perfectly within the realm of competition law. In that case, Financial Fair Play needs to be assessed under the usual mode of analysis under Article 101 (1) TFEU, without the need to spend any time at all on both Wouters and Meca-Medina. But, why then didn’t Vöpel see this and decided to do something that is in fact unnecessary and not even applicable when discussing the purely economic Financial Fair Play rules?

In my opinion, when reading the analysis of Vöpel in its whole, he picked up the economic nature of Financial Fair Play but simply ignored the fact that it is exactly that economic nature of FFP that makes an assessment under Wouters highly problematic. Vöpel actually states about the FFP main economic objective of ‘long term financial stability’ that such an objective can in itself not be seen as being truly ‘legitimate’ (and thus pass the ‘Wouters-test’), simply because such a status linked to an economic objective is simply never granted by the European Court of Justice in applying the Wouters and Meca-Medina principles (not in any case).\textsuperscript{143} He simply went true with an unnecessary assessment while picking up and even acknowledging the problem as discussed above. Of course we can ask ourselves, why? Well, without ever knowing for sure I believe it is the ‘sporting character’ of Meca-Medina that perhaps brought some confusion within his line of reasoning and made Vöpel to believe that doing a similar assessment in the case of the UEFA Financial Fair Play was the right thing to do. Basing it on similarity with Meca-medina is actually not a bad thought, but if you think it out carefully you simply cannot go around the difference in nature of the objectives.


\textsuperscript{143} Henning Vöpel (2013) [24]
(being non-economic against economic) and the fact that economic objectives simply will not fit the ‘Wouters-test’.

So to sum it up, the ‘Wouters-test’ is highly unlikely to be applicable in the case of UEFA Financial Fair Play. Simply because the line of reasoning as taken within Wouters (as well as the one taken in Mecha-Medina) is not applicable in the case of ‘economic’ activity. Since we have determined already in an early stage of this research that Financial Fair Play is of a purely economic nature it was possible to state that completing the whole ‘Wouters-test’, as done by Henning Vöpel, is in fact unnecessary and somewhat misplaced. Nonetheless, I believe that at least one principle of the so called ‘Wouters-test’ is not completely relying on the notion that the objectives should be of non-economic nature, and can be separated for that matter. Furthermore I believe that not discussing this principle, and leaving it out completely will diminish the essence of the research when it reaches its’ final conclusion. That’s why in the next part we will shortly discuss the notion of proportionality, and simply answer the question if there are less restrictive means possible than Financial Fair Play. After that Financial Fair Play needs to be assessed under the usual mode of analysis of Article 101 (1) TFEU.

3.3 The principle of proportionality: “less-restrictive” means.

In this part of the research we will shortly answer the question ‘if there any measures that are in fact less restrictive but equally efficient as the current UEFA Financial Fair Play rules?’.
Remember from our introduction that it was Jean-Louis Dupont that brought the initial claim before the ECJ against FFP on which we based this entire research in the first place? Well, he is the one that states that;

‘Even if FFP were sufficiently legitimate and necessary to justify its distortions of EU principles, however, it would still have to clear a final hurdle: proportionality. UEFA would need to convince the EU’s judges in Luxembourg that FFP is the least restrictive means of achieving its aims’.144

So, discussing this part is important for the initial claim as brought by Dupont, since his entire argumentation revolves around the principle of proportionality (“less-restrictive” means). Nonetheless, it should be seen as being completely separate from our analysis of Financial Fair Play under the ‘Wouters-test’ in our last chapter. It is meant to be illustrative in the first place, and helpful as well when reaching the end of this research.

144 Ian Lynam, ‘Financial regulation in Sport; Salary Caps and Financial Fair Play’, (2014) [Charles Russell LLP] [BASL/DMU PGC] [12]
It is Brian Kennelly that states that Financial Fair Play can easily be ‘replaced by another measure, equally efficient but less damaging as far as EU freedoms are concerned’. According to Stroucken, ‘in determining whether the Financial Fair Play rules are the least restrictive measure available’, one needs to consider some different measures that are in theory at least capable of being less restrictive than Financial Fair Play as such. These measures ‘include for example absolute salary caps [like the model basketball model as discussed earlier, e.d.]luxury taxes, reducing club compensation and revenue sharing’. Nonetheless, instead of discussing them all, those will be discussed that will help us give a clear picture in determining whether they are less restrictive but equally (or more) efficient as Financial Fair Play.

Let us first discuss the so called luxury taxes, since they were already introduced within contemporary European Football in the recent past. The luxury taxes, which are imposed upon the transfer fees of the players, were actually promoted by the Commission in a ‘recent independent study on transfers in sport’. However, the same holds for Financial Fair Play since we have seen in the introduction that the Commission is also very supportive of the UEFA in their implementation of these regulations. Question to be answered then is; if the luxury taxes as a less restrictive mean than FFP are equally efficient in the pursuit of the overall objectives? It seems at least doubtful that this is the case. Although luxury taxes are perhaps less invasive (which is just one of the requirements) and also aim to increase competitive balance in the long run, they succeed in their aim by adding to the downside of the story an actual increase in total salary payments and an increase in the excessive spending of the clubs because transfers become more expensive with the implemented taxes. This means that indeed the luxury taxes are less invasive and restrictive, but they cannot be seen as more or at least equally efficient when compared to Financial Fair Play.

Are there any measures that are in fact less restrictive but equally efficient as the current UEFA Financial Fair Play rules? What about the so called ‘salary caps’? Unlike Stroucken, who tends to lean towards the fact that salary caps are perhaps less restrictive but not as efficient as FFP, it is Ouriel Daskal who does not agree to this at all. He states that ‘salary caps are a much fairer way to cap spending’ than the way Financial Fair Play does it. He continues by explaining that within professional sports the most used salary cap is the so called wage cap, which is a sort of agreement

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146 Stroucken (2012) [31]
147 Ibid.
148 Ibid.
149 Ibid.
150 Ouriel Daskal, ‘UEFA Should Seriously Consider an Alternative to FFP; Making football a more sustainable business is a mission- but Financial Fair Play is not the only way to do so’ (2007) [Soccer Issue] at <http://www.soccerissue.com/2013/03/29/uefa-should-seriously-consider-an-alternative-to-ffp/>
or in some cases even a regulation that ‘places a limit on the amount of money that a club can spend on player salaries’. The fairness of the salary cap is hidden in the fact that it is the ‘result of negotiations between employers (Leagues & Clubs) and unions’, which automatically also makes it less restrictive than Financial Fair Play. The difference with for example the luxury tax is that it does not have the big downside. For example, in the pursuit of overall competitive balance as main objective, the clubs will actually decrease within their excessive spending. This is not simply an assumption. By implementing the salary cap within the Italian second division football league, the Serie B, it is factually proven that the salary cap can ‘help clubs save up to 25% on their current expenditure’. However, the salary cap model is not simply less restrictive (because of the fact that it is a result of negotiations involving the clubs themselves), but it is the fact that it goes in the direction of a collective bargaining model that makes it even likely to fall completely outside of the scope of competition law (exactly because of the agreement between players unions and clubs). Furthermore, it is also more efficient in the pursuit of its objectives like Financial Fair Play. So we can state that Financial Fair Play can be replaced by another measure, the salary cap, which is equally efficient but less damaging as far as EU freedoms are concerned. Thus, we can state that also on basis of the ‘less restrictive’ means assessment it is unlikely that Financial Fair Play is to be considered as being ‘proportionate’.

In this part we shortly discussed some alternative measures to Financial Fair Play in light of the principle of proportionality; and to show if there are any less restrictive means possible compared to FFP. In the next part we will resume our actual assessment of possible restrictions under Article 101 (1) TFEU.

3.4 FFP as restriction under Article 101 (1) TFEU; usual mode of analysis

Within our assessment on basis of the so called ‘Wouters-test’, it was stated that this way of assessing possible restrictions of the UEFA Financial Fair Play regulations as such is highly unlikely to be inapplicable. The line of reasoning as taken in this part is different and most importantly alternative in the sense that it is not leaning on the principles as laid down in the Wouters case (since these principles were found to be inapplicable). It is the line of reasoning as generally taken in any Article 101 (1) TFEU assessment. It is the common assessment based on that part of 101 (1) TFEU in which it states that those agreements, possibly restricting competition within the meaning of

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151 Ibid.
152 Ibid.
153 Ibid.
European Competition law, ‘have as their object or effect the prevention, restriction or distortion of competition’. 154

In performing this analysis it is necessary to divide the arguments into two parts corresponding with the relevant parts of Article 101 (1) TFEU, namely the separation of restriction by A) object or B) effect. In determining if the object of Financial Fair Play is to harm competition, it is Clinton R. Long that relies on the notions that we should ‘consider the precise purpose of the agreement’ 155 and that any agreements objects violate 101 (1) TFEU if ‘by their very nature [the rules] have the potential of restricting competition’. 156 Furthermore, he discusses the possibility that Financial Fair Play can have as an effect that it restricts competition within the meaning of Article 101 (1) TFEU. In doing this we must rely on the notion that ‘it is necessary to find those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent’. 157 Let us take both angles one by one, and discuss them on basis of the notions as set out above by globally following the line of reasoning of Clinton R. Long.

If we take the notion stating that an agreements object violate 101 (1) TFEU if ‘by their very nature [the rules] have the potential of restricting competition’, 158 when taking the precise purpose of the agreement in mind as well, the objectives of Financial Fair Play are possibly problematic. We can state that, as an object, the UEFA by implementing their FFP rules had the intention to ‘stop salaries from increasing and to, in essence, decrease spending by football clubs’. 159 According to Long this is a restriction of competition in every sense, since it prevents that clubs can decide for themselves what they want to spent. A consequence of this is also that the smaller, less rich clubs can simply not keep up with the clubs that have a much larger revenue. In completing the chain reaction of restrictive consequences caused by Financial Fair Play in this particular assessment, it also restricts players ‘from getting the salaries that they could on a free market’. 160 With this last notion Long emphasizes that with Financial Fair Play in place, like it is in contemporary European football with the UEFA as leading association, there is no such thing as a free market. FFP can thus be found to be restrictive by object in several ways.

The guidance that the Commission gave in its Guidelines on Article 101 (3) also points in the direction that Financial Fair Play is anticompetitive by object. In these Guidelines the Commission

155 Clinton R. Long ‘Promoting Competition or Preventing it?’ (2012) [91]
156 Ibid. [92]
157 Ibid. [93]
158 Ibid. [92]
159 Ibid.
160 Ibid.
states the following: ‘Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by [Article 101(1)]’.\footnote{See Article 101 (3) Guidelines on the application of Article 101 (3) TFEU OJ no C101 (2004)} Long answers this question on basis on the illustrations as set out above; he states that:

‘If there were no FFP rules, clubs would not be bound by regulations on what they can spend, sponsors would not have to worry about seeing their deals struck down, and players could get the salaries that the clubs deem them to deserve in the open market. While UEFA’s overall intentions in restricting these actions by clubs are meant to help football, some objects of the rules are to restrict competition’.\footnote{Long (2012) [92]}

This means that in principle we can conclude that even if we find out in the next part that Financial Fair Play has no anticompetitive effects, it by object is likely to prevent, restrict or distort competition in several ways within the meaning of Article 101 (1) TFEU. Nonetheless it is necessary to make an assessment of restriction by effect as well, simply because of the fact that we never can be too sure that the Commission as well as the European Court of Justice share the opinion that the objects of FFP are restrictive in any sense.\footnote{Ibid.} Furthermore it is for the sake of completeness of this alternative line of reasoning never a bad thing to make an effects analysis under Article 101 (1) TFEU.

As shortly mentioned above Financial Fair Play can have as an effect as well that it restricts competition within the meaning of Article 101 (1) TFEU. In assessing this one should rely on the notion that ‘it is necessary to find those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent’.\footnote{Ibid. [93]} Added to this notion should be that it can even be applied to what we call ‘likely anti-competitive effects’,\footnote{Ibid.} with which is meant so called prospective adverse effects on overall competition. Assessing this in the light of the UEFA Financial Fair Play regulations can be somewhat problematic since the rules are relatively new and evidence to support claims (either positive or negative for that matter) made in this assessment are somewhat scarce.

Nonetheless, evidence does exist that Financial Fair Play has at least some effect on contemporary European Football. Since Financial Fair Play is implemented by the UEFA, clubs in the English highest league, the Premier League, are spending less on player transfers mainly as a direct consequence of FFP. Clubs trying to simply abide by the rules, thus abiding to Financial Fair Play, makes that the owners (or other financiers) are for the most part restricted in what they want to
spend. For some clubs, especially the clubs with a much lower revenue (the poorer clubs), Financial Fair Play even prevents them to compete with other clubs in buying players as well as in competing with them on a sportive level in the long run.\textsuperscript{166} Long explains this in more detail and confirms that by effect competition is restricted by FFP. He states that;

‘The effect of these rules is that competition is also being distorted. The most detrimental effect of the FFP rules is that they appear to lock the football class structure firmly into place: the clubs with more income can spend more on players, while the poorer clubs cannot spend as much based solely on their lower income. […] The better a team is, the better its chances are of success in UEFA’s tournaments, which provides considerable perks and makes the rich clubs even richer and the poor clubs worse off in comparison’.\textsuperscript{167}

Furthermore, one should talk about the ‘likely anti-competitive effects’,\textsuperscript{168} mainly because the rules have not been in place for a very long time. Logically some of the effects are not measurable but merely foreseeable. But as we have mentioned also these likely effects fall under the scope of Article 101 (1) TFEU, and thus can be seen as an effect being able to ‘prevent, restrict or distort competition’. In illustrating such a ‘likely anti-competitive effect’ Long gives the example of a club being excluded from one of the UEFA club competitions, respectively the UEFA Champions League and the Europa League, because they are not complying with the core concept of FFP which is of course the break-even requirement.\textsuperscript{169} According to Long ‘this would literally restrict a club from competing on the field and financially as a result of lost revenue, fan base, and relevance, and this is an anticompetitive effect of the FFP rules’.\textsuperscript{170}

So, as we could have seen it is the most common line of reasoning under 101 (1) TFEU that actually can be applied to Financial Fair Play. Following this regular line of reasoning made it possible to conclude that Financial Fair Play can have its possible restrictions of competition under the scope of Article 101 (1) TFEU. We have seen that on basis of the object of FFP as well as on basis of the effects of the regulation problems can arise. In the assessment of possible restriction by object we have concluded that ‘while UEFA’s overall intentions in restricting these actions by clubs are meant to help football, some objects of the rules are to restrict competition’.\textsuperscript{171} In the assessment of possible restrictions by effect we have made a separation between effects that are already

\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid.
\textsuperscript{169} Ibid. [94]
\textsuperscript{170} Ibid.
\textsuperscript{171} Ibid. [92]
measurable and the so called ‘likely anti-competitive effects’. Both were found to be at least to some extent problematic under the scope of Article 101 (1) TFEU. While the measurable effects prevented and distorted competition in several ways, it were the ‘likely anti-competitive effects’ that could cause a direct restriction in the narrowest sense of the word.

After we have assessed that it is quite clear that there are competition law problems (at least potentially) for Financial Fair Play as implemented by the UEFA it is possible to take the assessment one step further. Next step in line of the research of the FFP relationship with the European Competition provisions is to see if there are any defences possible for the football association to all potential Article 101 (1) TFEU violations. The things that will be discussed in the following parts are 

A) ‘Withdrawal of possible restrictions by Financial Fair Play under the Block Exemptions’  
B) ‘General defences for Financial Fair Play on basis of the Agreement’ and last but perhaps the most important  
C) ‘Justifications for Financial Fair Play under article 101(3) TFEU’.

3.5 Financial Fair Play under the Block Exemptions.

As we are going to see later on in the process Article 101 (3) TFEU ‘allows the Commission to declare the provisions of Article 101 (1) inapplicable to a category of agreements’. Nonetheless, most people forget that this is also the foundation for the so called ‘Block Exemptions’. These exemptions are ‘made by the Commission, acting under delegated authority from the Council’. What exactly are these Block exemptions? Well, as explained by Paul Craig and Gráinne De Búrca the Block Exemptions have as an object to ‘exclude a generic type of agreement from the ambit of Article 101 (1) TFEU. However, these exemptions can only be applied in a limited amount of cases and do not specify if the agreements fall outside the scope of 101 (1) TFEU or contain an exception under 101 (3) TFEU which will be up for discussion later on. However, these exemptions do have certain common features; Craig and De Búrca state the following about the ‘Block Exemptions’;

‘They state the reasons for their enactment, set out the substance of the exemption, contain provisions limiting the size of the firms that can take advantage of them, and list the types of clauses that are and are not allowed within the relevant agreements. Such exemptions have been made for a number of areas, including: specialization agreements; research and development; vertical restraints; technology transfer; and franchising’.

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173 Ibid.
174 Ibid.
175 Ibid.
The way these exemptions are generally set up, is a classic format of ‘having a specific list of white clauses that were allowed and black clauses that were forbidden’. However, the classic format differs somewhat from the so called ‘New-Style Block Exemption’ that is applicable to for example the exemption of vertical restraints. In this new style, as implemented within Regulation 2790/99, there is no such thing as a white list. It simply works with the formula ‘if conduct was not prohibited it was therefore permitted’.

The question that remains is if the UEFA Financial Fair Play (as an agreement), that in our two-fold assessment of possible restrictions under Article 101 (1) TFEU turned out to clearly have some competition law problems, can be saved under the limited scope of the Block Exemptions as we shortly set out above. For the most part FFP is highly unlikely to fall under the scope of the exemptions, since there is no such regulation to exempt sporting rules like Financial Fair Play as such. It is also pretty clear that we cannot squeeze Financial Fair Play into the other categories to which the block exemptions are in fact applicable. Financial Fair Play is clearly not a specialization agreement, is not about research and development, is not about franchising, and is also not a technology transfer. Thus, Financial Fair Play and its possible restrictions under Article 101 (1) TFEU as assessed before cannot be exempted by the Block Exemptions whatsoever on basis of the above stated assumptions.

However, it is Stefan Szymanski together with Thomas Peeters, that characterize Financial Fair Play as ‘a form of vertical restraint’. They explain this by taking the UEFA ‘club licensing’ system that was already introduced in 2004-2005 as a starting point. According to them ‘club licensing functions as a set of vertical restraints, much in the same way that for example car manufacturers try to preserve quality standards at their dealerships’. The same holds for FFP since it is merely an addition to the licensing system of the UEFA and therefore holds the same characterisations. Despite the similarities, Financial Fair Play is a more uncommon sort of vertical restraint, simply because of the fact that is ‘one placed by a governing body on professional sports clubs aiming to compete in its championships’.

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176 Ibid [1001]
177 Commission Regulation No 2790/99 on ‘the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices’ OJ L336 (1999) P. 0021-0025
178 Craig & De Búrca, ‘EU Law’ [1001]
180 Ibid [2]
181 Ibid.
But, does this all automatically mean that FFP, as being characterized as a ‘vertical restraint’, will fall under the limited scope of the relevant (new style) Block Exemption on vertical restraints? In my opinion that question should be an definite no. The vertical restraints that fall under the scope of the exemption are the ones that are actually restricting competition in different ways, which is clearly the case on basis of our assessment under Article 101 (1) TFEU. Furthermore FFP’s benefits must outweigh the restrictions of competition (which is already highly unlikely when looking into our previous assessment). Not containing any of the so called ‘hardcore restrictions’ or not exceeding the 30% market share cap are the next concerns that Financial Fair Play needs to overcome. This means that FFP will not fit completely (perhaps it does partially) into the picture of the Block Exemption on vertical agreements.

But, as stated by the lawyers of Pinsent Masons ‘even if an agreement does not fit squarely within a block exemption, it still not automatically unlawful or unenforceable’. According to them there is also the possibility that any agreement can also be individually exempted. However, the individual exemption to which these lawyers refer no longer exists. It has simply been replaced with the direct application of Article 101 (3) TFEU, which will be discussed below.

3.6 Alternative defence for Financial Fair Play on basis of the “Agreement”

After having established that the Block exemptions do not apply (completely) to Financial Fair Play, and that it is also highly unlikely that it can benefit from an individual exemption, we would normally turn to the so called ‘justifications’ under Article 101 (3). However, it is the speciality of the Financial Fair Play regulation as implemented by the UEFA that possibly gives them an alternative defence on basis of the categorisation of FFP as being an ‘agreement’.

In the ‘Joint Statement on Financial Fair Play (FFP) rules and state aid control in professional football’ of March 2012 both the European Commission and the UEFA state that ‘the principles of FFP have been developed in cooperation with, and are fully supported by, all football stakeholders’. This means that as a defence to complaints in the face of Article 101 (1) TFEU, the UEFA can argue that the clubs also agreed to Financial Fair Play. However, fact is that actually none of the European clubs agreed to FFP on an individual basis. So, how can such a defence be structured? Well, in drafting the Financial Fair Play rules the European Club Association (ECA), which represents the different European Clubs, worked together with the UEFA and ‘both sides made concessions over

what the FFP rules would cover and entail'.

This means that a club claiming a violation of Financial Fair Play under any European Competition Law provision (or any other provision for that matter) will probably will have a difficult time since in essence they ‘agreed’ to the rules in the first place. However, the position of the clubs can become even more awkward in this possible UEFA defence to 101 (1) claims. This is illustrated by Clinton R. Long in the following way:

Furthermore, the European Commission considers clubs as undertakings, and UEFA can be considered an association of associations (national leagues) of undertakings (clubs) under Article 101(1). If the FFP rules are anticompetitive, then it seems counterintuitive that the clubs can complain about anticompetitive rules when they are the undertakings that make up UEFA and its member leagues regarding the FFP Rules.

A sort like defence can be used by the UEFA for claims under Article 101 (1) violations brought by the players, by stating that they in essence also agreed to the terms of the Financial Fair Play Regulation. Again no player individually agreed to Financial Fair Play, but this was in fact done through the players association FIFPro as an active ‘stakeholder’ in the agreement on the FFP rules. Different from the defence the UEFA can use for claims brought by the clubs, players themselves cannot be hold as being undertakings within the meaning of European Competition law. Therefore the players cannot be pulled into the awkward position the clubs can be in (see the above stated quotation in order to understand what that awkward position entailed).

Above we have seen an alternative way of defence for the UEFA (both brought by clubs as well as players) that can be used to undermine claims related to possible ‘violations’ of Article 101 (1) TFEU. But in how far this defence is actually usable before the Court for example? That question is shortly answered by Long, simply by stating that ‘it is unclear how influential this defense would be at the Commission or the Court of Justice’. Noticed must be that the Commission holds the authority of competition law enforcement. This means that, even though there is an ‘agreement’ between clubs and players on the one hand and the UEFA on the other, if the Commission finds a possible violation under any of the European Competition provision it would not be prevented from investigating Financial Fair Play in any way. So like Long, I would suggest that the this way of

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184 Clinton R. Long ‘Promoting Competition or Preventing it?’ [95]
185 Ibid.
186 Ibid.
187 Ibid.
188 Ibid.
189 Ibid.
190 Ibid.
defence is in any case useful, but simply nothing more than that. Therefore, I believe that it will not affect the further analysis of Financial Fair Play under the European competition law provisions.

3.7 Justifications for Financial Fair Play under Article 101 (3) TFEU

After having established that Financial Fair Play cannot be exempted by the so called Block Exemptions (and is unlikely to be individually exempted as well), and after we’ve concluded that the alternative way of defence against claims of violations under Article 101 (1) TFEU is probably nothing more than useful within Court proceedings, it is time to discuss the so called ‘justifications’ for UEFA Financial Fair Play under Article 101 (3) TFEU. Before we will discuss the possible justifications of FFP, let us first see what Article 101 (3) TFEU exactly states;

‘The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
— any agreement or category of agreements between undertakings,
— any decision or category of decisions by associations of undertakings,
— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’.


Article 101 (3) basically gives agreements, decisions & concerted practices a so called ‘legal’ exception when they fulfil the four conditions (although there is no clear fourfold separation of conditions within the actual text of Article 101 (3) TFEU). The four conditions that an agreement like Financial Fair Play needs to fulfil in order to be justified are the principles of A) ‘improvement’; B) ‘fair share to consumers’; C) ‘indispensability’ and D) the ‘no elimination of competition principle’. Noted should be that these four conditions are cumulative and exhaustive, which means these are the only four possible conditions to fulfil but all conditions need to be fulfilled in order for the agreement (or one of the other related practices) to gain exception under the justification principle of Article 101 (3) TFEU. Next step in this particular assessment is to discuss these four conditions one by one in relation to the UEFA Financial Fair Play agreement in order to answer the question ‘if Financial Fair Play can be justified under the principles of Article 101 (3) TFEU?’ (corresponding with the last part of research question 5 (2)).
Let us start with the ‘improvement’ principle of 101 (3), which basically means that the restrictive agreement in question should ‘contribute to improving the production or distribution of goods or to promoting technical or economic progress’\(^{192}\) in order to be (possibly) justified. Shortly this mean that an agreement in order to qualify for possible justification must have so called ‘efficiency gains’. Noted should be that the Article itself is only referring to ‘goods’, and we can state that Financial Fair Play as part of contemporary European football can definitely not be characterized as being a ‘good’. Nonetheless, by analogy we can state that the provision also applies to services and thus also can be applied to FFP.\(^{193}\) When making such an efficiency claim there are four principles that must be covered within the argumentation ‘in order to make the efficiency gains substantiated and verifiable’;

(a) ‘The nature of the claimed efficiencies;
(b) The link between the agreement and the efficiencies;
(c) The likelihood and magnitude of each claimed efficiency;
and
(d) How and when each claimed efficiency would be achieved’.\(^{194}\)

When it comes to the nature of the claimed efficiencies, the UEFA can argue that the essence of the gained efficiency by Financial Fair Play is ‘the financial viability’ of contemporary European football. In that way they prove to have an ‘objective benefit’ according to Long, which is a necessary requirement in an analysis of the efficiency gains.\(^{195}\) However, it is perhaps just on paper that the ‘financial viability’ of contemporary European football can really be characterized as an actual efficiency gain. On paper something like long term stability certainly is ‘an efficiency that can help the economic progress of football’, nonetheless we have seen in our two-fold assessment under Article 101 (1) TFEU that there is a significant downside to FFP as well when it comes to the ought ‘financial viability’. Therefore it is at the least somewhat unsure that FFP will fulfil this first principle of the so called ‘efficiency gains’.

Next up for discussion is the so called link between the discussed efficiency gains and the Financial Fair Play regulation. One can be very short and concise; since ‘the rules have been created with the direct purpose of making sure that clubs survive financially’.\(^{196}\) Determining the likelihood of the gained efficiency by FFP is the next step in this assessment. According to Long the likelihood of

\(^{192}\) Pierre Larouche, ‘European Competition law’ [slides lecture 6 on ‘Article 101 (3) TFEU’] [slide 5]
\(^{193}\) Long [97]
\(^{194}\) Ibid.
\(^{195}\) Ibid.
\(^{196}\) Ibid.
the efficiency gained by FFP is high; simply because of the fact that implementing the Financial Fair Play rules already stopped a significant amount of clubs from overspending, even though clubs only obey the rules because they don’t want to be cut out from the European UEFA club competitions. The same holds for the magnitude, it is high, since the rules are applicable to all clubs that fall under the European national football associations that are all members of the UEFA.

Last up for discussion is ‘how and when’ such efficiencies will be achieved by Financial Fair Play. When we talk about the ‘when’ aspect, we can state that Financial Fair Play clearly sets out timeframes in which efficiency is measured and reported (this is textually inherent to the FFP rules). The ‘how’ question is somewhat more vague. By placing financial restraints upon the different clubs the UEFA hopes that all clubs will act more financially responsible (although this seems more forced than it seems out of free will), which will lead to stable economic progress in the long run and thus should lead to the efficiency of ‘financial viability’ for the sport. Of course only time can tell us if such things are really achieved. Nonetheless, it seems that Financial Fair Play in general complies with the principle of having an clear efficiency gain, simply because it creates ‘benefits for the football economy’.

However, as we can refrain from the beginning of this assessment, Financial Fair Play needs to fulfil all four Article 101 (3) principles in order to be ‘justifiable’. This means that FFP also should benefit the so called ‘consumers’ or in other words; FFP should ‘allow consumers a fair share of the resulting benefit’. With consumers within this context is meant ‘all direct or indirect users of the product covered by the agreement’. The way this condition works is the following; if Financial Fair Play causes the consumers to be worse off than they would have been without these particular rules, this condition is simply not met. But is this the case with FFP? This is somewhat difficult to answer because we have a significant amount of ‘consumable products’ when it comes to contemporary European Football. Fans watching football are not the only consumers. Football clubs buying players are also consumers for that matter (we can recall this from the earlier determined threefold relevant market definition). Nonetheless, the UEFA will probably lump the consumers together in their argumentation by stating that all parties will be better off in the long run when football becomes more sustainable. However, in our assessment of possible violations under Article 101 (1) TFEU we

197 Ibid.
198 Pierre Larouche, ‘European Competition law’ [slides lecture 6 on ‘Article 101 (3) TFEU] [slide 5]
200 See chapter 2.4 ‘The Relevant Market definition of the UEFA and its Financial Fair Play Regulations’ [21]
201 Long [98]
have seen that at least not all parties will just benefit from the implementation of the Financial Fair Play rules. Therefore it is somewhat unlikely that FFP is meeting the ‘fair share to consumers’ condition in its way to possibly being justified under 101 (3) TFEU.

Although the condition of ‘fair share to consumers’ is somewhat (not highly) unlikely to be met (which time will tell in the long run), and therefore Financial Fair Play already seems to play away its chance of being ‘justified’ in its whole under Article 101 (3) TFEU (since the conditions are cumulative and all must be met), it is best to finish the assessment anyway. Not merely for the sake of completeness, but also because we cannot be completely sure about both assumptions made above, since they highly depend on time as well. In order to be completely sure we need to discuss the remaining two conditions of Article 101 (3) TFEU as well.

‘Indispensability’ is the next condition to hold against UEFA Financial Fair Play. This means that FFP should not ‘impose, on the firms concerned, restrictions which are not indispensable to the attainment of these objectives’. 202 Does it? Well, in a way it does. It can be argued that Financial Fair Play is ‘not reasonably necessary to stop clubs from going into debt’. 203 As discussed before there are alternatives, mostly used in other professional sports, that are likely to work as well in football when implemented by the UEFA. On basis of such a notion we can state that FFP is in fact indispensable, simply because of the fact that there are possible alternatives that in essence can have the same effect is Financial Fair Play in its current form. 204 Therefore FFP is highly unlikely to meet the third cumulative condition of Article 101 (3) TFEU, and is thus not capable of being ‘justified’ as such.

The fourth and last condition, the ‘no elimination of competition’ principle, is merely for the sake of completeness but not less important to discuss for that matter. For Financial Fair Play to meet that condition it cannot entail ‘the possibility of eliminating competition in respect of a substantial part of the products in question’ 205 (for the different products look back at the relevant product market as assessed earlier on in this research). Without going too much into detail, we can state that the possibility of eliminating competition is significant in the case of UEFA Financial Fair Play. Long states that;

202 Pierre Larouche, ‘European Competition law’ [slides lecture 6 on ‘Article 101 (3) TFEU] [slide 5]
203 Long [98]
204 Ibid.
205 Pierre Larouche, ‘European Competition law’ [slides lecture 6 on ‘Article 101 (3) TFEU] [slide 5]
‘With the rules in place, now the clubs with bigger stadiums, better sponsorships, and more fans will generate more revenue and will, therefore, have a substantial advantage in terms of what they can spend’.206

However, it is not merely these advantages for the bigger and richer clubs (since they always have been there since the beginning of contemporary European football) that make it anti-competitive. What really makes Financial Fair Play as eliminating competition is the fact that the rules ‘prevent clubs with less revenue from spending anything beyond their income in order to acquire a larger market share and attract more revenue’.207 Without elaborating this assumption too much, it is already pretty clear that FFP, as a set of financial rules, is highly unlikely to fulfil the fourth condition of Article 101 (3) TFEU as well, since it is in fact eliminating competition.

Thus, to wrap up the assessment of possible ‘justification’ for Financial Fair Play under Article 101 (3) TFEU, we can state that it is unlikely that protection under this article can be applied in the case of FFP. Simply because of the fact that the Financial Fair Play regulation does not fulfil all of the cumulative and exhaustive conditions of the relevant article as we have seen in our assessment above. The Financial Fair Play rules ‘appear to eliminate competition and do not appear to be indispensable to achieving financial stability’.208 To be more short and concise; Financial Fair Play cannot be justified under the principles of Article 101 (3) TFEU.

206 Long [99]
207 Ibid.
208 Ibid [101]
4 UEFA Financial Fair Play under Article 102 TFEU

4.1 UEFA; dominant position under Article 102 TFEU

In this part of the research we are going to assess the UEFA Financial Fair Play regulation against one of the other key European Competition provision, namely Article 102 TFEU. Goal of Article 102 of the Treaty on the Functioning of the European Union is to prevent the undertakings holding a dominant position in their relevant market to abuse this position so to harm competition. Before we are going to discuss the aspects of Article 102 TFEU in more detail, let us first see what the article exactly states;

‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’. 209

Noted should be that these four examples (a till d in the treaty text), are nothing more than some examples. This list is not exhaustive, so there can be other forms of abuse of dominant position that as well can fall under the scope of Article 102 TFEU.

It is possible to split this treaty article up in four main parts that need to be discussed in order to fulfil the assessment of Financial Fair Play under Article 102 TFEU; A) ‘undertakings’, B) ‘dominant position’, C) ‘abuse of the dominant position’ and D) ‘affecting trade between Member States’. On part A we can be very short; in the first steps of this research we have determined that the UEFA, as being a sports association, is qualified as an undertaking. Something sort like holds for part D; in chapter 2.5 we have concluded that Financial Fair Play as implemented by the UEFA as an undertaking is definitely harming the trade between Member States one way or another. So in our assessment of FFP under Article 102 TFEU it will be pointless to repeat these parts all over again,

since we’ve already determined that the UEFA, with its FFP rules, is fulfilling both conditions. That leaves us with parts B and C; the dominant position and the abuse of that position by a firm. Let us first discuss part B; the dominant position in general. What exactly is a dominant position?

The term ‘dominant position’ was first defined in the so called United Brands case back in 1978, when the European Court of Justice ruled that such a position, within the meaning of Article 102 TFEU (Article 82 EC), means;

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers’.  

Is this the case with the UEFA? Is the UEFA in a dominant position? We can be very concise in answering these questions; The UEFA is the sole European football association and therefore, as the only firm on its threefold relevant market of clubs, players and sponsoring, it does not have any competition at all. According to Vermeer ‘a monopolist who does not face any competition at all is dominant by definition’.  

Robert Siekmann puts it somewhat differently by stating that sports organisations like the UEFA mostly have ‘practical monopolies in a given sport and may thus normally be considered dominant in the market of the organisation of sports events’.  

Furthermore, it is also possible to argue for the UEFA to be holding a “collective” dominant position. This can be done on basis of the so called Piau case, where in paras 114 a collective dominant position was argued because of the link between the associated clubs and the FIFA as the overarching sports association. In the Piau case it is thus argued that it is the market position vis-à-vis the football clubs that makes the FIFA as being collectively dominant. In the decision of the Piau case the Court of First Instance acknowledged this argumentation by stating that;

‘It seems unrealistic to claim that FIFA, which is recognised as holding supervisory powers over the sport-related activity of football and connected economic activities, such as the activity of players’

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210 See Case C-27/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities (1978), ECR P.00207


213 See CFI Case T-193/02 Laurent Piau v Commission of the European Communities (2005) ECR, P. II-00209, paras [114]
agents in the present case, does not hold a collective dominant position on the market for player’ agents’ services on the ground that is not an actor on that market’. 214

This argument is of course easily applicable upon the UEFA in our research. Being similar sport associations (having the same structure) it can be argued that the UEFA is also holding a “collective” dominant position in the market. Nonetheless, I am of the opinion that considering “collective” dominance in the case of the UEFA (and back then with the FIFA as well) is wrong. I believe that it is impossible to state, on basis of the link between clubs and in our case the UEFA as association (that should make up this ‘collective’ dominance), that the UEFA is acting as a single or common entity. It has happened in the past (and will likely to happen in the future as well) that UEFA members have contested UEFA decisions, which makes it unlikely for real collective dominance to exist.

My opinion on “collective dominance” despite, it is thus highly likely that a court would find that the UEFA holds a dominant position on the market. Therefore, since it is still possible that Article 102 TFEU is applicable, we will pursue with part C) of 102 TFEU; ‘abuse of the dominant position’.

4.2 Is Financial Fair Play an abuse of dominance under Article 102 TFEU?

In the last part we have determined that associations like the UEFA, being the sole leader on their market, are likely to hold a dominant position. Nonetheless, the existence of a dominant position, like the one of the UEFA (which we determined above), will not automatically give problems under Article 102 TFEU. In order to give rise to competition law problems the company (or in this case association) holding the dominant position should be abusing this position. 215

Again we can fall back on the Piau case, in which Laurent Piau is contesting the Players’ Agent Regulations as implemented by the FIFA. In his claim before the Court of First Instance, he also claims that there is an applicability of Article 102 TFEU (Article 82 EC back then) to these regulations. He states that the;

‘FIFA […] is abusing its dominant position on the related market of services provided by players’ agents. FIFA is an association of undertakings and the amended regulations constitute a decision by an association of undertakings. Representing the interests of all buyers, FIFA is acting as a monopsony, a

214 CFI Case T-193/02 Piau (2005), paras [115]
215 Ibid.
single buyer imposing its conditions on sellers. The abuses of the dominant position are the result of the binding provisions of the regulations’.\(^{216}\)

Can such arguments be applicable to the situation of UEFA Financial Fair Play (which is also a set of regulations)? Well, I believe that the argumentation of Laurent Piau is not completely accurate when we are comparing the situation in that particular case with the case against UEFA Financial Fair Play. In the case of Financial Fair Play we thus have to ask ourselves quickly again whether the UEFA has conducted any of the practices mentioned in Article 102 TFEU.\(^{217}\)

It is Andreas Stroucken that makes a strong statement in this matter by stating very directly that 'by adopting the Financial Fair Play rules, UEFA has not conducted any of the practices mentioned ’\(^{218}\) in Article 102 TFEU. In other words the UEFA has not abused its position by implementing the Financial Fair Play regulations. Why not? Well, first of all it is important to know that there are no treaty articles or court decision on the principle of “abuse” (which means there is at least some room for manoeuvre). According to Whish and Bailey there are only some guiding principles around what they call “abusive conduct”.\(^{219}\) It is the first guiding principle that tells us that ‘behaviour is only abusive where it […] is likely to cause clear and demonstrable harm to consumers’.\(^{220}\)

Thomas James Jemson states that ‘the FFP regulations concern the relationship between UEFA, football clubs, and players’.\(^{221}\) I believe he is missing sponsors as part of the overall market definition, but that will not alter the point he wants to make. Jemson states that because of this closed relationship Financial Fair Play creates between the four (including sponsors), it is possible to state that FFP imposes ‘no direct effect on consumers as they do not affect pricing or harm the viability of a competitor’.\(^{222}\) This means that, in absence of the crucial element of harm to consumers, we must conclude that Financial Fair Play cannot be considered as being abusive.\(^{223}\) Consequently, this means that Financial Fair Play is not prohibited by Article 102 TFEU, which is thus inapplicable in our research.

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\(^{216}\) CFI Case T-193/02 Laurent Piau (2005), paras [57]
\(^{217}\) See the complete Article on page [47]
\(^{218}\) Stroucken (2013) [34]
\(^{219}\) Whish & Bailey, ‘Competition Law’ at [193]
\(^{220}\) Ibid. [194]
\(^{222}\) Ibid. [13]
\(^{223}\) Ibid. [14]
Preliminary Conclusion

This preliminary conclusion is ought to situate the main findings of the research so far, that is based upon the actual case of Jean-Louis Dupont, on behalf of players agent Daniel Striani, against possible violations of the Financial Fair Play rules as implemented by the UEFA within the meaning of the Treaty and especially the European Competition provisions article 101 and 102 TFEU. On basis of the arguments of Dupont (as the starting point and inspiration of this thesis) a complete competition law assessment was set up in order to shed light on the actual case that could take years to from now to conclude, since it is not likely to be an easy ride.

The competition law assessment existed out of four main steps, namely qualifying the UEFA (the creator of FFP) under European Competition law, assessing the relevant market definition, assessing the effect on trade between Member States and the actual assessment of Financial fair Play under 101 and 102 TFEU (split up in the assessment in different chapters). To keep this preliminary conclusion as understandable as possible, it is best to split the findings up according to the separation as also made above and throughout the actual assessment also corresponding with the research questions.

First main finding within the research was that is possible to qualify the UEFA as an undertaking. In our assessment of that specific part we have seen that the UEFA can be qualified as both an undertaking and an association of undertakings and thus falls under the scope of the competition provisions. We have also seen that sometimes the UEFA is even referred to as being an ‘association of associations of undertakings’. This is because of the fact that the UEFA is acting as ‘an instrument of professional clubs’ cooperation’.

Secondly, we’ve defined the relevant market for the UEFA and its Financial Fair Play. In our analysis of the UEFA Financial Fair Play Regulations against the European Competition provisions we’ve found the relevant product market in fact to be threefold (three different relevant product markets), consisting out of, clubs who have players as their products, players who have clubs as their products and sponsors who, although in a different manner as explained, also have clubs as their relevant products. In case of the so called relevant geographical market we’ve concluded that it is not as simple as being and EU wide market. Concluded was that the relevant geographical market consists of the members of the UEFA and therefore those countries are in the geographical market of which their national football associations are within the UEFA.
Thirdly, before turning to the actual assessment of Articles 101 and 102 TFEU, an general assessment was made of Financial Fair Play possibly ‘affecting trade between Member States’. We can conclude that ‘FFP will inevitably have an impact on the transfer market and player trading between member states’\(^{224}\) within the European Union. We’ve based this on the argument of Nixon that it is ‘generally accepted that rules adopted by international sports governing bodies [like the UEFA] will affect trade when an economic activity is involved’. So, obviously we’ve stated that the UEFA Financial Fair Play rules are affecting trade between Member State one way or another.

Last, but certainly not least, we turned towards the actual assessment of Financial Fair Play under the European Competition provision, namely Articles 101 and 102 TFEU. In the actual assessment these two were split up and within each article a separation was made between possible violations and possible defences. Again to keep this preliminary conclusion as clear to read as possible we will follow the order as made in the competition law assessment.

101 (1) TFEU, was the first Treaty article that we used to shed light on the UEFA Financial Fair Play rules. In assessing possible Article 101 (1) violations we’ve established first that Financial Fair Play can in fact be seen as an agreement, and retrieved the ‘agreement’ to affect trade between Member States by way of the break-even requirement. Further analysis was done by way of the Wouters-test to find out if FFP has as its ‘object or effect the prevention, restriction or distortion of competition’.\(^{225}\) Found was that Financial Fair Play, having a purely economic nature, simply does not fit the principles as laid down in Wouters and Meca-Medina. Therefore the ‘Wouters-test’ is simply inapplicable in the case of assessing Financial Fair Play. Nonetheless, by also taking the usual mode of analysis towards finding possible 101 (1) TFEU violations by FFP, this research is not dependent upon the Wouters-test. Within the common line of reasoning, based upon the findings of Clinton R. Long, we’ve reached the conclusion that Financial Fair Play is possibly violating Article 101 (1) TFEU in several ways.

Defences to possible 101 (1) TFEU claims, was the next topic of discussion. First up for discussion within this threefold assessment was if Financial Fair Play could be exempted under the so called Block Exemptions. The answer to this was very straightforward; Financial Fair Play and its possible restrictions under Article 101 (1) TFEU cannot be exempted by the Block Exemptions in any way (same holds for gaining an individual exemption). Normally, one should then turn towards the so called ‘justifications’ under Article 101 (3) TFEU, but showing that clubs and players actually agreed to the FFP rules turned out to be another possible defence for the UEFA against 101 (1) claims.

\(^{224}\) Andrew Nixon (2014)

Nonetheless, it is unsure how effective this defence will be when brought forward within the ECJ. Normally more effective defences arise from Article 101 (3), but in the case of Financial Fair Play as implemented by the UEFA we’ve found that it is unlikely to gain protection under the justifications of European Competition law. Mainly because of the fact that the FFP rules are likely to eliminate competition and because they do not appear to seem indispensable for achieving their main goal of long term financial stability.

An analysis under Article 102 TFEU was the next big step to take in the competition law assessment of FFP. While this particular assessment was way less revealing than the 101 assessment, it was at least as important to do so (even if it was for the sake of completeness). In this assessment we’ve found the UEFA at least to hold a dominant position within the relevant market. This is the case simply because the UEFA is a monopolist who does not face any competition at all. This makes the sports association dominant by definition. Besides this, we argued that the UEFA also holds some form of “collective dominance”. However, we also found out that this was perhaps not the right way to look at the ‘dominance’ principle in case of the UEFA.

After this, we’ve moved to a possible abuse of dominance under 102 TFEU. Having a dominant position on the market does not prove that the UEFA is in fact abusing this position, which is a necessary requirement in order to fall under the scope of Article 102 TFEU. Study on the actual abuse of dominance was in the first place done on basis of the Piau case. However, the findings within this case were not completely parallel with the research on Financial Fair Play. In a newly started assessment was found that the UEFA has not abused its position by implementing the Financial Fair Play regulations. Simply because of the fact that FFP imposes ‘no direct effect on consumers as they do not affect pricing or harm the viability of a competitor’. This made that we’ve concluded Financial Fair Play to be non-abusive, and therefore Article 102 TFEU is inapplicable.

So, in essence we can state that the relationship between Financial Fair Play and the European Competition provisions (for the most part under Article 101 TFEU) is very problematic. The UEFA will have a hard time with claims brought before the European Court of Justice, simply because under the scope of European Competition law Financial Fair Play seems to at least have some problems (which is unlike some people believe as we have seen throughout the assessment). The problems the UEFA encounters can get even bigger because of the fact that most of the defences they can bring forward, especially under Article 101 TFEU, cannot be upheld in Court. We’ve stated at the beginning of this thesis that the process of Duponts’ challenge is unlikely to give him an easy ride and could take a number of years to conclude. Nonetheless, as we can retrieve from the assessment

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226 Jemson at [13]
(as summarized in this preliminary conclusion), the same holds up for the UEFA in the process. Also from the view of the UEFA it will unlikely be a short and easy ride.

This is exactly the reason for this conclusion to be merely ‘preliminary’. In light of the assumptions made above we can ask ourselves if Financial Fair Play is worth all this trouble for the UEFA? Is it worth being pulled before the European Court of Justice for the claims based on the European Competition provisions by Jean-Louis Dupont? Is it worth a lingering process that could take years to conclude (which means a long time of bad publicity as well)? In light of these questions, I am suggesting that Financial Fair Play tempts to deal with problems in contemporary European football that are perhaps beyond the capacities of the UEFA, and simply cannot be dealt with by implementing a set of financial rules with a ‘simple’ break even requirement as a core concept like FFP does. Problems that, if they were being tackled in a sufficient manner, would make FFP as a set of rules regulating parts of finance within contemporary football superfluous. Problems, if tackled, that will make claims under the European competition provisions not only unnecessary, but perhaps even impossible. Problems, if dealt with, that will make competition more balanced and thus tackles the utmost essence of what is seen as problematic under Financial Fair Play.

With this I am not suggesting that the FFP rules should be changed in any way to be less restrictive (we’ve already seen that there are less restrictive means possible that are in essence not restrictive of competition when we discussed luxury taxes or absolute salary caps in the ‘proportionality’ part of this research) and to dodge the essence of the claims as brought forward, because it’s the core of the rules that makes it restrictive in the first place. I would actually suggest to abandon it completely. But, instead of replacing it with a different less restrictive concept, I would suggest that the UEFA (or the Commission for that matter) tackles those things that lay at the root of the problem. Therefore, in the next part of this thesis, we will take the assessment as started in the beginning even a step further, or as the title suggests ‘beyond’ Financial Fair Play. In this specific parts we ask ourselves questions like; what did the UEFA overlook when they came up with Financial Fair Play? Or to formulate it somewhat differently and more rigorously; where did it go wrong?
6 Taking the assessment ‘beyond’ Financial Fair Play

6.1 Introducing the ‘beyond’ within this next step

As we have seen throughout the assessment of Financial Fair Play under the European Union competition provision, specifically Articles 101 and 102 TFEU, the way the UEFA tries to solve the problem of overinvestment by implementing a simple break-even requirement is probably going to be problematic in the actual claim as brought forward by Jean-Louis Dupont. With some knowledge of the underlying factors that can cause overinvestment we will see that it is not solved simply by taking into account that the relevant expenses cannot exceed relevant incomes (in excess of the acceptable deviation). As discussed earlier, considering alternatives is one way of dealing with (at least a part) of the problem. Alternatives like ‘luxury taxes’ or ‘absolute salary caps’ were proven to be less restrictive of competition within our analysis of Article 101 (1) violations (Wouters-test).

Nonetheless, as touched upon within the preliminary conclusion, this is not the aim of this section reaching ‘beyond’ Financial Fair Play. Nor is this section aimed at providing real solutions or even a definitive answer on how to solve the overinvestment problem in contemporary European football (which is the original problem with which we started this research in the first place). This section is in fact aimed at providing an illustration that there are other things besides Financial Fair Play or sort like (although less restrictive) alternatives. It is aimed at revealing problems in contemporary European football that are perhaps beyond the capacities of the UEFA, and simply cannot be dealt with by implementing a set of financial rules with a ‘simple’ break even requirement as a core concept like FFP does. Looking ‘beyond’ Financial Fair Play in such a manner should show that that such underlying problems, when tackled, make rules like FFP or alternatives superfluous in the battle against the original problem of overinvestment.

Furthermore, when defining these underlying problems we should ask ourselves not only what the UEFA overlooked (which is about revealing the underlying problems), but as important is the question of why the UEFA overlooked such things when deciding that a set of Financial Fair Play regulations with a simple break-even requirement as its’ core concept was the best thing to do in ensuring the long-term financial viability of contemporary European football. So, basically we ask ourselves the rigorous question of; where did it go wrong? What did the UEFA decide to implement Financial Fair Play, which seemed to be quite problematic with competition law from the start, while

227 Andreas Stroucken, ‘UEFA Financial Fair Play’ (n 5) [5].
there were other underlying problems that when tackled will (at least partially) solve the problem as well?

6.2 The problem of UEFA club compensation

Within contemporary European football one thing has always been clear, there is an not to be denied relationship between success on the field (so called ‘sporting success’) and the wealth of a certain club (so called ‘financial success’). It is Johan Lindholm that sheds more light on this by stating that;

‘Although a certain connection is inherent in professional sports, European football is organized in a way that creates a threshold effect that that induces teams to engage in overinvestment. Advancement to a superior national league, advancement to European club competitions, and achieving a national championship are often connected with significantly larger revenues’. 228

According to Lindholm this creates ‘financial incentives for a club to ‘gamble’ on player recruitment’. 229 Thus such a club, longing for crossing such a threshold and to be able to compete for example in one of the European club competition, will offer a player money (in order to ‘play’ for them) which it perhaps even can’t afford. Club compensation in general, stimulating ‘overinvestment’, thus seems to be problematic for that matter. But let us focus on the UEFA club competitions (Champions League and Europa League) and its revenues. Simply, because the UEFA and their implementation of the problematic Financial Fair Play rules should remain the focus of this research.

In contemporary European football, including the UEFA club competitions (although they work somewhat differently), we have a so called open league model. Open leagues are multiple layer competitions that use a system of promotion and relegation. Within such a system the determinant of promotion and relegation is so called ‘on field success’ (which fits the first made notions as made above on the basis of Lindholm). The notion of on field success or so called ‘sporting success’ is also the main determinant of the UEFA club competitions. Within each UEFA member country it is determined within the first major league (and cup competitions) which teams eventually qualify to take part within these European club competitions. So, sporting or on field success within the


229 Ibid.
different national competitions eventually makes how the starting list of both UEFA club
competitions would look like. This means that, in light of the Lindholm way of thinking, already to
take part in these competitions is an incentive to overinvest, simply because it is connected with an
indefinite increase in revenues.

Lindholm emphasizes this by summing up some facts on UEFA club compensation; He
grabs back to some earlier UEFA seasons (since the text stems from 2011), with which the 2009-2010
season is up for discussion. He states that in that particular season;

‘...the UEFA distributed over $1 billion to the thirty-two clubs participating in the UEFA Champions
League (on average $32 million per club), whereas clubs participating in the less prestigious Europa League
received, on average, ‘only’ $3.9 million’\(^{230}\) (note that the total revenue also includes the revenue of the UEFA
Super Cup game between the winners of both prestige competitions).

To show that this amount of money is in fact increasing every European season, in the 2012-
2013 season ‘the estimated gross commercial revenue from the UEFA Champions League and the
UEFA Super Cup is €1.34 bn [e.d. billion]’ (estimated around $1.84 billion, to conform with the
currency as taken by Lindholm in his illustration). This means that within two seasons we have an
increase of over 50% in the revenues of the UEFA club competitions. The way these both
competitions are set up basically means that, besides taking part already gets you a huge revenue
(which is somewhat less money for the ‘less’ prestigious UEFA Europa League), the further you will
get in competition the more money you will make. In my opinion this takes away for the most part
the fact that it is a battle for prestige, to be the best within Europe (or in the case of the Europa
League; ‘to be the best of the rest’). Which is something that always was the case when we look back
to the ‘good old days’.

So, on basis of all this (which is perhaps looks a bit confusing from time to time) we can make
a very easy assumption; we’ve illustrated in this part that club compensation (on basis of the
threshold theory by Lindholm) is factually an incentive for overinvestment. Same holds for the
allocated UEFA revenues when taking part in one of the club competitions. The further you get the
more money you make as a participating club, which even makes the incentive for overinvestment
worse. But the big question around the general problem of UEFA club compensation as illustrated
above is of course; How does this relate towards UEFA Financial Fair Play?

\(^{230}\) Ibid.
6.3 Club compensation v Financial Fair Play.

In this particular part of the assessment going ‘beyond’ Financial Fair Play (although we do catch up with FFP within this part) we are going to link two topics within our research, namely the topic of the UEFA club compensation/ revenues (as discussed in general above) and the topic of Financial Fair Play and its battle against European competition law (which is discussed and summarized throughout the entire text). This is going to be a step by step analysis (with some repetition as well) to show that the UEFA, with the implementation of its Financial Fair Play rules, overlooked the topic of its very own club compensation within both their prestige competitions.

First of all, we have to determine the main problem that is set out throughout this complete research. It was discussed already within one of the first paragraphs of the introduction, we also mentioned it in the club compensation part of the ‘beyond’ FFP assessment. It is the problem of ‘overinvestment’ that is the main denominator in our research. To quote from the introduction we have stated that ‘despite a constant cash flow, the majority of clubs participating in the top of Europe's divisions and leagues are actually loss-making (56% in 2010, 55% in 2011), while 36% of the remaining clubs reported a negative equity in 2010 (38% in 2011)’. \footnote{See Introduction p [1] of this research} We can simply state that the majority is thus overinvesting their money.

Secondly, we have found out (which was already touched upon lightly by van Dijk in the introduction) that most clubs overinvesting their money is because of the incentives that come with the so called ‘open league’ model, incentives like promotion and relegation, which are determined by so called ‘on-field success’. But the main (and basically the only highly problematic) incentive when looking into the UEFA, as a subject of research within this entire research, is the incentive of prize money or club compensation as discussed above. So far we have said nothing new.

Furthermore, to counter the problems of overinvestment within contemporary European football, the UEFA, as the sole European football association, implemented a set of financial rules called UEFA Financial Fair Play. The so called core concept of these rules is the so called break-even requirement. This rules simply means that football clubs are not allowed to spend more money than the money they make (to keep it in very simple terms). So far still nothing new.

But, what if we state that it actually is the fact that something quite simple like its very own club compensation in combination with the implementation of Financial Fair Play is the biggest mistake the UEFA could ever had made in its fight against the problem of overinvestment. I dare to
state that it is this deadly combination of a simple break-even requirement and constantly increasing compensation every single season that makes the goal of the UEFA, which was ‘long-term’ financial stability, a complete joke. I dare to state that the implementation of Financial Fair Play, while maintaining the way of compensation within its two prestige competitions (perhaps three when you include the UEFA Super Cup), is only making things worse in the first place. Let me explain this by making a very abstract explanation of what my thoughts are, after which I will try to illustrate that with actual thoughts of other people talking about the same problem within contemporary European football.

Let’s say that within a certain national competition we have four football clubs that are estimated to have the league’s highest budget out of the 16 clubs that are competing. Within this national competition the 4 highest ranked teams at the end of the season (places 1 till 4) will qualify themselves directly for either the UEFA Champions League or UEFA Europa League. Then the UEFA implemented their so called Financial Fair Play rules and says; ‘to compete in one of these competitions you have to at least break-even’ or to say it simply; don’t spend more than you make.

The four teams with the highest budget will have simply more money to put into their players material, even though they also have to comply with Financial Fair Play. Other teams with much lower budget simply don’t have the money to being able to compete because they have to comply with the Financial Fair Play rules. So, let’s state that these four clubs (the ones with the higher budgetary) will cover the first four places at the end of the season and are qualified for the UEFA Champions league.

It is these four clubs that will benefit from the high club compensation that is strongly interlinked with participation in these prestige European competitions. The other 12 teams in this example will have no extra money, and simply cannot expand or stretch their budget to being able to compete for these first four places (the ones that get you qualified). Simply, because they have to comply with the break-even requirement to qualify for these competitions. While, on the other hand, the first four teams (which already we’re the high budget or ‘richer’ clubs to start with) will return next season with an even higher enlarged budget. And are thus most likely to qualify again in that season.

So, in my opinion, the strong connection between Financial Fair Play and the compensation evolving around the European competitions, both under the supervision of the UEFA, will make competition more unfair every single season. This combination of two things regulated by the same association, by the same leading body within contemporary European football, will cause a
downwards spiral that will never stop in my opinion. It’s a vicious circle that will repeat itself every single season. Implementing Financial Fair Play, with a simple break-even requirement, which is ought to deal with the overinvestment problem that is terrorising current day football, will only make the incentives for overinvestment worse (or makes that clubs are trying to find ways to go around Financial Fair Play) and as well will break the ideal of a competitive balance which is also one of the main goals of the UEFA to achieve (or perhaps even to maintain).

Knowing that I just threw around a bunch of abstract subjective assumptions in making my point, let us illustrate this and substantiate my claims by taking a quote from Henning Vöpel who in essence comes to the same conclusion (although without interlinking in a specific manner the different phenomena with Financial Fair Play in the way that I did); he states that:

‘...those teams who succeed in the competition and qualify for the Europa League or the Champions League receive much higher revenue. They can use additional income to invest in new players, thereby becoming an even stronger team which most likely will manage to re-qualify the following year. In this way an upward spiral of self-sustaining development is triggered by an initial success. In the long run this process could end up with the dominance of a few teams predetermining the championship and making it less interesting.’

Although this substantiates the claims I made earlier, it still remains somewhat abstract. In order to show that this is all actually happening in contemporary European football, we need to take current day examples as being the ‘pencil’ that makes the illustration complete. I think this can best be illustrated by showing a figure with the revenues of all Europe’s top football clubs of around 2009 (the time when Financial Fair Play started to raise at least some discussion). In this figure (figure 1 on the next page) you can see that the most familiar clubs within Europe (the so called ‘richer’ clubs) also receive the biggest revenues (compensations) out of prize money (out of different competitions, so not just the UEFA competitions).

If we take the starting list of the UEFA Champions League of this particular season (2013/2014), we can state that 12 out of the 20 teams that are on the list of 2009-2010 biggest revenues, we’re once again participating in the UEFA Champions league this season. Which means that 60% (thus a majority) of the clubs with high revenues around the time Financial Fair Play was implemented for the first time by the UEFA, are still among the core of clubs participating in the most prestige UEFA Champions League this season. Out of the teams that were on the list in the figure of 2009 but are not competing in the Champions League this season (8 teams) another two teams (another 10%) are participating in the ‘less’ prestige Europa League this season. Which means that a

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232 Henning Vöpel, ‘Do we really need...’ (2011) [55]
total of 70% of the clubs with the biggest revenues/compensation back in 2009/2010 are still competing within the top of Europe today.

Figure 1; Clubs with the biggest received revenues in the 2009/10 season.\(^{233}\)

With this illustration of facts, I think I proved the point that we are moving in the direction of a vast majority of clubs that are continuously participating within the UEFA Champions League (or Europa League) simply because they have the biggest amount of money within their own national competitions. Getting even higher incomes every year (because of the continuous participation rates) makes competitive balance hard to maintain in the long run. This is even made worse with implementation of Financial Fair Play, which gives the smaller clubs no room to operate at all. So, we have found a strong relationship between Financial Fair Play and the turned out revenues (‘prize’ money) from the UEFA club competitions. But how does this relationship fits into the battle of Financial Fair Play against the claims brought under European competition law?

\(^{233}\) Ibid. [54]
6.4 How does this relate to the FFP fight against competition law?

In the last part we have found out that there is a strong relationship with the UEFA Financial Fair Play regulation and the system of club compensation as also implemented by the UEFA. We have found out that this combination is influencing the overall competitive balance and creates even more incentives for our root problem of ‘overinvestment’. But how does this all fit in an assessment of Financial Fair Play under European competition law? How can we fit the topic of compensation, that seems to be related one way or another, into the main topic of this research?

Well, let us start again with the root problem of ‘overinvestment’, the problem that we have seen is the cause of the UEFA implementing the break-even requirement as core concept of the FFP regulation. We have also seen that the problem of ‘overinvestment’ is initiated by the system of club compensation; getting more money for taking part in both UEFA prestige club competitions. The problem of overinvestment is thus the denominator on which we founded the above described relationship. Out of this relationship we can find the answer as to in which ways it relates towards the fight of UEFA Financial Fair Play against the European competition provisions, Article 101 and 102 TFEU.

Throughout this whole assessment on European competition law, we have seen that Financial Fair Play is problematic in several ways (as well as under 101 as under 102 TFEU). For these reasons the UEFA is brought before Court by Jean-Louis Dupont (on behalf of Daniel Striani). We have asked ourselves if Financial Fair Play as a set of financially tinted rules is worth all this trouble? Which is at first sight a difficult question to answer. Nonetheless, it is the system of club compensation, also implemented by the UEFA, that pushes the answer over the edge into a definite no. No, it is simply not worth the trouble. Why not?

Financial Fair Play tries to deal with the problem of overinvestment with a simple break-even requirement as core, and tries to accomplish long-term financial stability in contemporary European football in this way. This system an sich is actually not so bad. Although it gives rise to competition law problems, in theory the system could actually work. But as always, with making changes in a certain system it will influence other related systems as well. It seems that the UEFA completely overlooked the system of compensation. A system that in itself already was seen as number one incentive for overinvestment, is being emphasized by the implementation of Financial Fair Play. So the questions that we can ask ourselves; why implement the FFP system that clearly influences club compensation and thus the overall competitive balance, while at the same time it will give you the ride to ‘hell’ when it comes to claims brought under European competition law?
In my opinion, on basis of this relationship between UEFA club compensation and UEFA Financial Fair Play, I would say that it is best to either drastically change the compensation system in a way that it is not influenced anymore by FFP, or to completely abandon Financial Fair Play and take a good look again to the compensation system since that already seems problematic enough without FFP in place. Either choice would be an absolute improvement seen from the current situation. But, as always, one solution seems to outreach the other.

My advice would be to completely abandon Financial Fair Play as such. Why? Well, simply because of the fact that it will save the UEFA a lot of trouble under European competition law. As I mentioned or suggested earlier, it is not for sure at all that you will lose the case but it is simply not worth it. Besides, leaving it in place but only changing the compensation system, would improve the situation but will simply not solve everything. But, I do not dare to say that doing it the other way around solves everything, and will restore contemporary European football to its full old glory either. But I think the problem of overinvestment is best tackled by removing the incentives to do so. So changing the UEFA club compensation, by simply cutting in prize money and letting it be about ‘prestige’ about ‘being the best’, will remove a lot of the incentives to overinvest. Furthermore, this will mean that you will tackle the root problem of overinvestment, without the need to implement a set of financial rules like Financial Fair Play that is ought to tackle the same problem in the first place.

To sum things up; the UEFA should save the problems and effort it would have to put in Financial Fair Play in defending themselves against the claims brought before Court under European competition law (the problems under Articles 101 and 102 TFEU), and instead take the easy way out by dealing with the same problem of overinvestment by tackling the UEFA club compensation system and remove the proved incentives for overinvestment. This way the UEFA will not only avoid all the trouble and claims that will be there with FFP under European competition law, but it may also have a sort like effect on the root problem of this assessment.
Concluding Remarks

Assessing whether the UEFA Financial Fair Play regulations are compatible with European competition law was not an easy job. It is the character of Financial Fair Play as being implemented by a sports association that make it difficult to draw definite conclusions on the actual subject.

Nonetheless, we have seen (and concluded already in part 5) that it seems that Financial Fair Play as such is problematic in several ways. We have seen that under Article 101 (1) (both on basis of the Wouters-test and on basis of an alternative way of thinking) the Financial Fair Play ‘agreement’ will most likely to cause problems. Problems that are not likely to be justified by ways of Article 101 (3) (or other ways for that matter). Furthermore, we have seen that Article 102 TFEU is inapplicable, since the implementation of Financial Fair Play is not an abuse of dominant position.

That is where we stopped the competition law assessment and took it ‘beyond’ Financial Fair Play (because the original assessment was not fully satisfactory). Within this part I tried to show you that Financial Fair play, that is ought to deal with the problem of overinvestment, is influencing the incentives for that very same problem of overinvestment in a negative manner. Finding a strong relationship between the UEFA compensation system and FFP made me believe that Financial Fair Play simply is not worth all the trouble it will get under competition law, simply because there is a more easy way out. The assessment therefore ended in a sort of advisory towards the UEFA to abandon Financial Fair Play completely and tackle the incentives instead. Of course I know this seems somewhat drastically and is unlikely to ever happen.

With this in mind I would like to return to the very first letters of this thesis; the actual title of the assessment. There it was asked if Financial Fair Play would likely to get a ‘yellow card, red card or no card at all?’ Well, in my opinion, based on all the findings I did throughout this research, the UEFA leaves me no other choice than giving Financial Fair Play a red card and suspend it for as many games as possible. To end this thesis in some football metaphor; with Financial Fair Play the UEFA tried to make a ‘tackle on the ball’ but misinterpreted the situation and ‘tackled the player’ instead.
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