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Clinton R. Long, *Promoting Competition or Preventing It? A Competition Law Analysis of UEFA's Financial Fair Play Rules*, 23 Marq. Sports L. Rev. 75 (2012)

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PROMOTING COMPETITION OR PREVENTING IT? A COMPETITION LAW ANALYSIS OF UEFA'S FINANCIAL FAIR PLAY RULES

CLINTON R. LONG*

I. INTRODUCTION

Rangers are one of Europe's most storied football clubs,¹ having won more Scottish football titles—fifty-four—than any other club.² Based in Glasgow, Scotland, Rangers have long had an intense rivalry with Celtic, a fellow Glaswegian club, with the two sides first playing a match in 1888.³ The Old Firm, as the rivalry is called, extends beyond the usual fanfare attached to a sports rivalry; there are significant religious and political overtones at play.⁴ Celtic fans are traditionally Irish and Catholic, while Rangers supporters are generally British, Unionist, and Protestant.⁵ The rivalry and the behavior of the clubs' fans, which has included numerous acts of violence, racism, and bigotry in stadiums and on the streets, have become so intense that the Scottish Parliament enacted a law prohibiting sectarian speech related to football matches.⁶

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1. Because the subject matter of this paper deals with Europe, European "football" is used instead of the American "soccer." Also, "clubs" are privately owned, while teams are those that represent the nation in international events. FRANKLIN FOER, *HOW SOCCER EXPLAINS THE WORLD: AN UNLIKELY THEORY OF GLOBALIZATION* 3 (2004).

2. Christopher Elser, *Rangers Administrators Will Consider Three Bids for Soccer Team*, BLOOMBERG (Apr. 5, 2012), <http://www.bloomberg.com/news/2012-04-05/rangers-administrators-will-consider-three-bids-for-soccer-team.html>.

3. *Brief History*, CELTIC FC, http://www.celticfc.net/about_briefhistory (last visited Nov. 13, 2012).

4. Matthew Harold, *Celtic Set for Ibrox Glory as Lennon's Men Prepare to Complete Rangers' Great Collapse*, GOAL.COM (Mar. 24, 2012), <http://www.goal.com/en-gb/news/2932/spl/2012/03/24/2986439/celtic-set-for-ibrox-glory-as-lennons-men-prepare-to>.

5. *Id.*

6. *Anti-Bigot Laws Passed by the Scottish Parliament*, BBC NEWS (Dec. 14, 2011), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-16138683>.

Despite the history of the Old Firm and its place in Glaswegian and Scottish culture, it is possible that the rivalry could cease to exist.⁷ Rangers have entered into administration, a form of bankruptcy in the United Kingdom, and have among its debts approximately £49 million in unpaid taxes owed to Her Majesty's Revenue and Customs.⁸ Serious financial irresponsibility and scandals have imperiled the stability of Rangers,⁹ and it is possible that Rangers could be liquidated.¹⁰ This puts the future of the Old Firm in jeopardy, which might not be a problem for some who think the rivalry goes too far,¹¹ but it impacts the revenue—somewhere around £120 million each year—and thousands of jobs sustained solely by the rivalry.¹²

Rangers are one of many clubs in Europe facing serious financial trouble, and European football's governing body has taken actions to ensure that all clubs, rivalries, and leagues maintain a level of financial stability. The Union of European Football Associations (UEFA) is the “parent body of European football” and governs the national football associations of fifty-three European countries and nations.¹³ As part of its governing responsibilities, UEFA recently created the controversial Financial Fair Play (FFP) rules to prevent clubs from getting into financial predicaments that threaten the sustainability of European football. The main tenet of the FFP rules is to “live within your means,”¹⁴ or for a club to only spend what it earns in other words, with UEFA reserving the right to exclude non-compliant clubs from prestigious European

7. See Harold, *supra* note 4.

8. *Id.*

9. See Alex Guy, *Scottish Premier League: Celtic-Rangers Rivalry at Stake Amidst Scandal*, BLEACHER REP. (Feb. 19, 2012), <http://bleacherreport.com/articles/1071991-scottish-premier-league-celtic-rangers-rivalry-at-stake-amidst-scandal>.

10. Andrew Slevison, *Murray Worried that Rangers Will Go into Liquidation*, TRIBALFOOTBALL (Apr. 4, 2012), <http://www.tribalfootball.com/articles/murray-worried-rangers-will-go-liquidation-3063801>.

11. Guy, *supra* note 9.

12. *Old Firm on the Ball for Economy*, BBC NEWS (June 29, 2005), http://news.bbc.co.uk/2/hi/uk_news/scotland/4635535.stm.

13. *Overview*, UEFA.COM, <http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html> (last updated Jan. 28, 2012). Some countries have multiple member associations due to traditional national borders. For example, in the United Kingdom, there are four associations that are members of UEFA: the Welsh, Scottish, English, and Northern Irish football associations. See *UEFA Rankings: Country Coefficients 2012/13*, UEFA.COM, <http://www.uefa.com/memberassociations/uefarankings/country/index.html> (last updated Sept. 11, 2012).

14. Press Release, European Comm'n, State Aid: Vice President Almunia and UEFA President Platini Confirm Financial Fair-Play Rules in Professional Football Are in Line with EU State Aid Policy (Mar. 21, 2012), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/264&format=HTML&aged=0&language=EN&guiLanguage=en>.

competitions.¹⁵

Anticipating the possibility of lawsuits over the rules and fearing the financial result of multiple claims for damages, UEFA President Michel Platini began discussions with the European Commission to declare the FFP rules legal under European Union (EU) law and to receive immunity from lawsuits under some sort of “judicial protection.”¹⁶ Sometime later, the Commission’s Vice President, Joaquín Almunia, issued an official letter that applauded the FFP rules and the efforts of UEFA to protect the sport. The letter stated that Almunia “fully support[s]” the rules and declared that the rules were consistent with state aid laws of the EU.¹⁷

The Commission’s response to UEFA’s immunity requests is intriguing, as are commentators’ reactions to the Commission’s letter. Despite the fact that the Commission only specifically mentioned state aid law,¹⁸ some thought that this declaration amounted to an exemption from Commission scrutiny regarding any possible violation of EU competition law.¹⁹ Others, without going as far as calling it an exemption, have said that for all intents and purposes, no challenge to the FFP rules is sustainable. The Commission and UEFA “have acted to prevent any member football club mounting a challenge in court . . . [by saying] that the rules are fully compliant with European Union Law.”²⁰ Yet, others argue that this view is mistaken, as there is no *de jure* or *de facto* competition law exemption, and the Commission is fully capable of enforcing competition law in regard to these rules.²¹

With this debate come two questions regarding the FFP rules and their relationship to EU competition law. The answers to these questions will form

15. Leander Schaerlaeckens, *Will FFP Save Football from Itself?*, ESPN (Jan. 4, 2012), http://espn.go.com/sports/soccer/news/_id/7355528/soccer-financial-fair-play-end-football-reckless-spending.

16. *Platini Wants EU Cover*, THE DAILY STAR (Sept. 25, 2011), <http://www.thedailystar.net/newDesign/news-details.php?nid=203810> (quoting Platini).

17. Letter from Joaquín Almunia, Vice President, European Comm’n, to Michel Platini, President, UEFA (Mar. 21, 2012), *available at* http://ec.europa.eu/competition/sectors/sports/letter_almunia_en.pdf.

18. State aid is “an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities,” and Article 107 of the Treaty on the Functioning of the European Union prohibits most state aid given by Member States unless it falls under certain exceptions that are considered compatible with the common market. *State Aid*, EUROPEAN COMM’N, http://ec.europa.eu/eu_law/state_aids/state_aids_en.htm (last updated Sept. 28, 2012).

19. Stijn Francis, *Rules of Financial Fair Play—Point of View of the European Commission*, STIJN FRANCIS (Mar. 26, 2012), <http://www.stijnfrancis.be/?p=372&lang=en>.

20. *UEFA and European Commission Sign Joint Agreement Endorsing Financial Fair Play Rules*, DLA PIPER (Apr. 2012), <http://info.dlapiper.com/rv/ff00049b7e8bf6c174fcdaced4cb7098f1d4282/p=8>.

21. *See, e.g.*, Francis, *supra* note 19.

the framework for this Article.

The first question is: Has the Commission extended an exemption from EU competition law scrutiny to the FFP rules? The answer to this question is no; the Commission told UEFA that its rules were in compliance with state aid law, but there is no evidence to indicate that this amounts to a *de jure* exemption from competition law scrutiny.

The second question is: Are the FFP rules legal under Article 101 of the Treaty on the Functioning of the European Union, which prohibits anticompetitive agreements between undertakings?²² The answer to this question is unclear. The FFP rules are problematic under Article 101 because competition regarding clubs, players, and sponsors is, or likely will be, restricted. However, UEFA can effectively argue that the players and clubs have agreed to the rules, which would undermine their, but not the sponsors', complaints of competition law violations. The Commission is still empowered, of course, to bring its own investigation of the rules regardless of these parties' acceptance of them. While it is possible that the FFP rules could receive an exemption under Article 101(3), this is unlikely because there are less restrictive alternatives for achieving financial stability and because the rules eliminate competition.

This Article will first present a brief introduction to the FFP rules and their implications for European clubs, which includes a short explanation of what UEFA is. Next, there will be an analysis of whether the Commission's response to UEFA's request for judicial protection amounts to an EU competition law exemption. Following this section is a discussion of how the FFP rules appear to violate Article 101 and then a section regarding the defenses that UEFA could raise if competition law violations exist, including an analysis of an Article 101(3) exemption. Finally, a conclusion will appear at the end of the Article.

II. UEFA AND THE FFP RULES

In order to provide a better understanding of the context of the FFP rules, this section will discuss UEFA and its structure and role in European football,

22. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Mar. 30, 2010, 2010 O.J. (C 83) 53 [hereinafter Treaty]. Article 102 of the Treaty also deals with competition issues, specifically the abuse of a dominant position. *Id.* art. 102. Because of the nature of the FFP rules and the collaboration between UEFA and the clubs, it is more fruitful here to study the potential of an anticompetitive cartel than to look at UEFA as a monopoly. Furthermore, as Advocate General Lenz once said regarding another football case, "the present case does not concern the power on the market which the clubs taken together have against competitors, customers or consumers," which is what Article 102 seeks to prevent. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶ 286.

the motives that led to the creation of the FFP rules, and a description of the rules and their implications for European football clubs.

A. *UEFA and the Motives for Creating the FFP Rules*

UEFA governs the national football associations of fifty-three European countries and nations, literally from A(thens) to Z(agreb) and everywhere in between.²³ UEFA's jurisdiction involves regulating international competitions between national teams and privately owned professional clubs.²⁴ UEFA organizes two club tournaments each year: the Champions League, the premier event, and the Europa League, "the poor cousin."²⁵ The Champions League includes thirty-two of Europe's best clubs that qualify based on a complicated system of rankings and performance in qualifying rounds.²⁶ The Europa League also consists of a tournament that leads to one champion each season.²⁷ As will be discussed below, a club that does not abide by the FFP rules could be ruled ineligible for either of these tournaments.²⁸

UEFA's Executive Committee is the "supreme executive body" and has general jurisdiction over UEFA in areas not delegated to the UEFA Congress.²⁹ Concerned about the financial state of many of Europe's clubs, the committee used this authority to initiate the creation of the FFP rules in 2009.³⁰ In addition to Rangers mentioned above, some of Europe's most prestigious clubs have either been spending far more than they earn, struggling to stay afloat financially, or both. Spain's Real Madrid and FC Barcelona have a longstanding rivalry,³¹ and both clubs have been spending outlandish

23. *Overview*, *supra* note 13.

24. Lindsey Valaine Briggs, Comment, *UEFA v The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439, 439 (2005).

25. Matthew Barnette, *Is the UEFA Europa League the Poor Cousin of the Champions League?*, CHAMPIONS LEAGUE TALK (Aug. 8, 2011), <http://championsleaguetaalk.com/2011/08/08/is-the-uefa-europa-league-the-poor-cousin-of-the-champions-league/>.

26. *Competition Format*, UEFA.COM, <http://www.uefa.com/uefachampionsleague/season=2012/competitionformat/index.html> (last visited Nov. 13, 2012).

27. *See Format*, UEFA.COM, <http://www.uefa.com/uefaeuropaleague/season=2012/competitionformat/index.html> (last visited Nov. 13, 2012).

28. Schaerlaeckens, *supra* note 15.

29. *UEFA Executive Committee*, UEFA.COM, <http://www.uefa.com/uefa/aboutuefa/organisation/executivecommittee/index.html> (last updated Jan. 6, 2012).

30. *Financial Fair Play*, UEFA.COM, <http://www.uefa.com/uefa/footballfirst/protectingthe-game/financialfairplay/index.html> (last visited Nov. 13, 2012).

31. Matthew Futterman, *Real Madrid's Bid for World Domination*, WALL ST. J., Apr. 20, 2012, at D12.

sums for some of the world's best players.³² Real Madrid makes more than \$500 million annually, but as of 2009, the team had a debt almost nearly as high.³³ Its rivals in Barcelona have similar spending habits. As of 2010, FC Barcelona had a debt of \$578 million despite annual revenues of nearly \$500 million and recently had to take out a loan just to make payroll.³⁴ Both clubs have achieved incredible success, and their spending is directly linked to a desire to outdo the other and continue winning.³⁵

On the other side of the success spectrum are less prestigious clubs that have gained recent notoriety and success as a result of increased spending. Manchester City is a club that has never been considered among the most prestigious clubs in Europe, England, or even its own city. Manchester United, its cross-town rival, has dominated the rivalry and is a mainstay in English and European football.³⁶ Wealthy new ownership took over Manchester City, which led to significant upgrades in terms of player talent and club achievement and also enormous increases in spending.³⁷ The club posted a loss of £194.9 million in a recent season, with player salaries consuming £174 million of payroll.³⁸ Manchester City can handle losses for the time being because of the ownership's deep pockets,³⁹ but not all clubs can.

Much of this financial behavior can be attributed to European football's system of acquiring players and paying salaries. Clubs acquire players in three different ways. The first is through its own development system, which includes a football academy to help develop the young players' football abilities.⁴⁰ For the Portuguese phenom Cristiano Ronaldo, enrollment in Sporting Clube de Portugal's academy came at age twelve.⁴¹ As happened with Ronaldo, the expectation is that the players move up through the system

32. Leander Schaerlaeckens, *Rolling out of Control*, ESPN (Sept. 22, 2010), http://espn.go.com/sports/soccer/news/_id/5580467/european-football-eating-itself.

33. *Id.*

34. *Id.*

35. See Futterman, *supra* note 31.

36. See Richard Jolly, "A Win Will Change Manchester City's History", THE NAT'L (Apr. 30, 2012), <http://www.thenational.ae/sport/football/a-win-will-change-manchester-citys-history>.

37. DSG, *Arsene Wenger Fears Fall of Fair Play Rules*, SPORT.CO.UK (Nov. 23, 2011), http://www.sport.co.uk/news/Football/59637/Arsene_Wenger_fears_fall_of_fair_play_rules.aspx.

38. *Id.*

39. See *id.*

40. See, e.g., Blair Downey, *The Bosman Ruling: European Soccer—Above the Law?*, 1 ASPER REV. INT'L BUS. & TRADE L. 187, 189 (2001) (Can.).

41. Luca Caioli, "Mentally He Was Indestructible": Why Sporting CP Paid 22,500 Euros for a 12-Year-Old Cristiano Ronaldo, GOAL.COM (Apr. 6, 2012), <http://www.goal.com/en-us/news/1956/europe/2012/04/06/3017515/mentally-he-was-indestructible-why-sporting-cp-paid-22500>.

and its various levels of teams to eventually play for the highest club in the organization.⁴²

The second way of acquiring players is by purchasing them with one club paying the other a transfer fee in exchange for the player.⁴³ In Ronaldo's case, when his current club Real Madrid purchased him from Manchester United, the transfer fee was approximately £80 million, which did not include his yearly salary of about £11 million.⁴⁴ His contract also includes a clause requiring a payment of €1 billion from anyone seeking to buy him from Real Madrid.⁴⁵

The third manner of acquiring new players is to sign them to a contract after their contracts with their previous teams have expired. Before a landmark decision in the *Bosman* case by the European Court of Justice in 1995 and per UEFA rules in existence at the time, signing a player whose contract had expired required the payment of a transfer fee between the two clubs.⁴⁶ Jean-Marc Bosman, a Belgian football player, wanted to change clubs⁴⁷ and succeeded in convincing the Court of Justice that this transfer fee requirement violated the Treaty's guarantee of the free movement of workers.⁴⁸ After this decision, EU nationals whose contracts expire are free agents and can pursue agreements with other clubs without having to depend on the acceptance of compensation by their old clubs.⁴⁹ With the free agency system and the enormous transfer fees and salaries, it is not hard to see how many clubs are struggling financially.

42. See, e.g., Downey, *supra* note 40, at 189.

43. Rick J. Lopez, Comment, *Signing Bonus Skimming and a Premature Call for a Global Draft in Major League Baseball*, 41 ARIZ. ST. L.J. 349, 374 (2009).

44. *Ronaldo Completes £80m Real Move*, BBC SPORT (July 1, 2009), http://news.bbc.co.uk/sport2/hi/football/teams/m/man_utd/8121951.stm.

45. *Real Madrid Shield Cristiano Ronaldo with €1bn Buy-Out Clause*, INSIDE WORLD SOCCER (June 23, 2009), <http://www.insideworldsoccer.com/2009/06/cristiano-ronaldo-real-madrid-contract.html>.

46. Downey, *supra* note 40, at 189.

47. Bosman's contract worth 120,000 Belgian francs (BFR) per month with RC Liège was expiring, and RC Liège offered him a new one-year deal for 30,000 BFR per month. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶¶ 42–43. Bosman found a French club—US Dunkerque—that wanted to sign him, and the two clubs agreed on a transfer that required the filing of the transfer certificate from the Belgian national football association (URBSFA) to its French counterpart (FFF) by a certain day. *Id.* ¶ 44. Because RC Liège did not believe that US Dunkerque could afford the transfer fee, it did not request that URBSFA complete the filing requirement to FFF by the due date, the deal did not go through, and the club suspended Bosman for the season. *Id.*

48. *Id.* ¶¶ 248–49.

49. See Downey, *supra* note 40, at 190.

B. FFP Rules

To fight financial instability, UEFA has approved the FFP rules, which require all clubs that participate in UEFA competitions to break even each season or be relatively close to breaking even.⁵⁰ The rules apply to all clubs that compete in UEFA competitions.⁵¹ There are three monitoring periods for all clubs: the first period is the calendar year that ends during the current or most recent season, and the second and third periods are the two years prior to that calendar year.⁵² What is measured is the difference between “relevant income” and “relevant expenses.”⁵³ “Relevant income” includes ticket sales, broadcasting revenue, and other similar sources of income,⁵⁴ and “relevant expenses” includes salaries among other costs.⁵⁵

The “break-even requirement” at the heart of the FFP rules is that relevant expenses cannot exceed relevant income, with some exceptions.⁵⁶ There is a permissible deviation of €5 million for one period.⁵⁷ However, if the disparity is “entirely covered by contributions from equity participants and/or related parties,” the amount of permissible deviation is €45 million for the 2013–2014 and 2014–2015 measuring periods and €30 million for the 2015–2016, 2016–2017, and 2018–2019 periods.⁵⁸ This requirement will be applicable to all clubs beginning with the 2013–2014 season, which means that 2012 will be the first reporting period, and penalties for not breaking even during certain periods can be imposed beginning with the 2014–2015 season.⁵⁹

The “ultimate penalty” that can be imposed is “exclusion from competitions.”⁶⁰ The enforcement mechanism of these rules includes the Club Financial Control Panel, which has the jurisdiction to conduct audits, evaluate the information submitted by the clubs, and generally assess whether the FFP rules and the break-even requirement are being followed.⁶¹ The bottom line of

50. See generally UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS arts. 57–63 (2010) [hereinafter FFP RULES].

51. *Id.* art. 57.

52. *Id.* art. 59(1).

53. *Id.* art. 60(1).

54. *Id.* art. 58(1).

55. *Id.* art. 58(2).

56. *Id.* art. 63.

57. *Id.* art. 61(2).

58. *Id.*

59. *Securing a Long-Term Balance*, 105 UEFA DIRECT, 2011, at 12, 12, available at http://www.uefa.com/MultimediaFiles/Download/EuroExperience/uefaorg/Publications/01/59/87/45/1598745_DOWNLOAD.pdf.

60. *Id.*

61. *Club Financial Control Panel*, UEFA.COM, <http://www.uefa.com/MultimediaFiles/Down>

the rules is that clubs must be able to pay their employees, including the players, and other clubs in transfer fee arrangements, or they cannot participate in UEFA competitions.⁶²

III. THE COMMISSION'S APPROVAL OF THE FFP RULES

A. UEFA and the Commission

The FFP rules have been met with skepticism. The manager of Arsenal, a well-known English football club, Arsène Wenger, doubts not only that UEFA will have the ability to enforce the rules but also that clubs like Manchester City and its enormous debt can meet the break-even requirement so quickly.⁶³ Newcastle United manager Alan Pardew expressed pessimism that the rich clubs will be bound by the rules, saying that they will likely be able to find their way around the rules with other sources of income.⁶⁴ A frequently mentioned potential loophole is for owners to find ways of padding their relevant income—and thus, the amount they can spend—by, for example, having another company they own sponsor their club.⁶⁵

In the face of skepticism and criticism, UEFA has sought protection against legal action by upset clubs. Some clubs care more about staying financially afloat than others,⁶⁶ but any club would be upset by exclusion from competition, also known as the “atomic bomb.”⁶⁷ UEFA says that it is confident that its rules are in compliance with EU law and that it would prevail in court,⁶⁸ but UEFA President Michel Platini stated “I know the clubs will take us to court. It’s the first thing they will do [if they are excluded from UEFA competitions].”⁶⁹ Platini went to the president of the European Commission, José Manuel Barroso, in order to get the Commission to give the

load/uefaorg/Clublicensing/01/64/89/99/1648999_DOWNLOAD.pdf (last visited Nov. 13, 2012).

62. See *Securing a Long-Term Balance*, *supra* note 59, at 12.

63. DSG, *supra* note 37.

64. Mark Douglas, *Don't Let Rich Clubs Out of New Rules, Pleads Alan Pardew*, SUNDAY SUN (U.K.), Apr. 1, 2012, at 68.

65. *Manchester City's Deal with Etihad an 'Improper Transaction' as Uefa Urged to Outlaw 'Close' Contracts*, THE TELEGRAPH (Mar. 7, 2012), <http://www.telegraph.co.uk/sport/football/teams/manchester-city/9128914/Manchester-Citys-deal-with-Etihad-an-improper-transaction-as-Uefa-urged-to-outlaw-close-contracts.html> [hereinafter *Manchester City*].

66. See Futterman, *supra* note 31.

67. Matt Slater, *Uefa's Plan for Balanced Budgets & Level Playing Fields*, BBC SPORT (Aug. 16, 2011), <http://www.bbc.co.uk/sport/0/football/14482429>.

68. David Conn, *Uefa Intends to Sanction Clubs Who Continue to Report Huge Losses*, GUARDIAN (U.K.), Jan. 25, 2012, at 46.

69. *Platini Wants EU Cover*, *supra* note 16.

FFP rules “judicial protection.”⁷⁰ Otherwise, Platini argued, multiple large claims by clubs could threaten the existence of UEFA.⁷¹ Barroso said he would “deal with it.”⁷² The breadth of the desired protection and what Barroso meant in response are unclear.

Similarly ambiguous is the Commission’s response. In March 2012, Joaquín Almunia (who currently holds a dual role as Vice President of the Commission and Competition Commissioner)⁷³ and President Platini published a joint statement regarding the Commission’s opinion of the FFP rules.⁷⁴ The statement applauded the FFP rules and said that the rules were consistent with state aid law.⁷⁵ Vice President Almunia also sent a letter to President Platini to pledge support to the FFP rules and to tout the policy reasons behind the rules.⁷⁶

B. Does This Amount to a Competition Law Exemption?

A number of commentators interpreted the Commission’s response to mean that UEFA and the Commission were both saying that the FFP rules are “fully compliant with European law,”⁷⁷ which would include an exemption from competition law scrutiny.⁷⁸ According to some commentators, there is now “little sense in clubs challenging the ruling.”⁷⁹ UEFA Secretary General Gianni Infantino agreed, saying, “[I]t reaffirms what we have always said that the FFP rules are legal and in accordance with European legislation.”⁸⁰

Unless these commentators are privy to information not available to the general public, it does not appear that the Commission has decided anything about competition law’s relationship to the rules. Perhaps the commentators

70. *Id.* (quoting Platini).

71. *Id.*

72. *Id.* (quoting Platini).

73. Joaquín Almunia, *Mandate*, EUROPEAN COMM’N, http://ec.europa.eu/commission_2010-2014/almunia/about/mandate/index_en.htm (last visited Nov. 13, 2012).

74. *See generally* Joint Statement by Joaquín Almunia, Vice President, European Comm’n, and Michael Platini, President, UEFA (Mar. 21, 2012), *available at* http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf.

75. *Id.* For a brief definition of state aid law, see *State Aid*, *supra* note 18.

76. *See generally* Letter from Joaquín Almunia to Michel Platini, *supra* note 17.

77. *Financial Fair Play Loophole Closed as EC Agree Rules Fit with European Law*, MAIL ONLINE (Mar. 21, 2012), <http://www.dailymail.co.uk/sport/football/article-2118248/UEFA-Financial-Fair-Play-loophole-closed.html> [hereinafter *Financial Fair Play Loophole*].

78. Francis, *supra* note 19.

79. *Financial Fair Play Loophole*, *supra* note 77.

80. Mike Collett, *Platini Wins EC Backing for Financial Fair Play Regulations*, INDEPENDENT (U.K.), Mar. 22, 2012, at 76.

have exaggerated the Commission's announcement or been confused by the fact that it came from the Competition Commissioner.⁸¹ Also, some might think that because Vice President Almunia, also the Competition Commissioner, did not say anything about any competition problems with the FFP rules, he would not support investigating any competition complaints about the FFP rules. This collection of assumptions could make one think that there is some de facto exemption because, if Vice President Almunia does not want any investigations brought, then the Commission will not bring them. However, if he had wanted to discourage clubs from bringing their competition claims to the Commission, his letter to President Platini and the joint statement did not say so. Furthermore, it is clear from the *Commission White Paper on Sport* that there is no general exemption for sports under EU law.⁸²

While the relationship between Vice President Almunia and President Platini seems to be cordial⁸³ and the joint statement makes it seem that the Commission and UEFA agree on some aspects of the FFP rules, this is no guarantee that the Commission will refrain from enforcing any competition law violations. The two bodies have clashed in the past over competition issues. After the Court of Justice decided *Bosman*, UEFA said it would not abide by the decision.⁸⁴ Even though the Court of Justice did not rule on the competition issues at issue in *Bosman*, then-Competition Commissioner Karl Van Miert threatened UEFA with heavy fines if it did not implement the court's rulings.⁸⁵ UEFA begrudgingly agreed to follow the decision while continuing to complain about what would happen to football as a result.⁸⁶ Although the relationship between Vice President Almunia and President Platini appears warmer than this, it is clear that the Commission has the authority to enforce competition law⁸⁷ and that "[b]y not ruling on the competition issue [in *Bosman*], the court placed the burden of interpreting the

81. State aid law, which is what Vice President Almunia said the FFP rules complied with, falls within the Directorate General for Competition's jurisdiction. *Directorate General for Competition*, EUROPEAN COMM'N, http://ec.europa.eu/dgs/competition/index_en.htm (last visited Nov. 13, 2012).

82. *Commission White Paper on Sport*, at 13, COM (2007) 391 final (July 11, 2007) ("Sport activity is subject to the application of EU law.").

83. For example, in his letter announcing his support of the FFP rules, Vice President Almunia wrote "Cher Michel" ("Dear Michel") next to the more formal "Mr. le Président" introduction that had been typed onto the page. Letter from Joaquín Almunia to Michel Platini, *supra* note 17.

84. Patrick Closson, Note, *Penalty Shot: The European Union's Application of Competition Law to the Bosman Ruling*, 21 B.C. INT'L & COMP. L. REV. 167, 175–76 (1998).

85. *Id.* at 168.

86. *Id.* at 177.

87. *Directorate General for Competition*, *supra* note 81.

competition law in the hands of the Commission.”⁸⁸ Vice President Almunia and his successors are not prevented from enforcing EU competition law just because UEFA and the Commission signed a joint letter regarding state aid law.

Additionally, parties in the EU can seek guidance from the Commission on potential competition law violations. The Commission can issue an “informal guidance letter” if a party is unclear about a potential competition law violation, and the Commission can also state in some cases whether a set of facts meet the requirements of Article 101(1) or Article 101(3).⁸⁹ The joint statement, related press releases, and letters did not mention any specific requests by UEFA for such statements or decisions. Because there has been no official Commission statement giving the FFP rules an exemption under EU competition law, the FFP rules are subject to the competition laws of the EU.

IV. COMPETITION LAW AND THE FFP RULES

In order to navigate through the world of EU competition law and how it applies to the FFP rules, this Section will proceed as follows. First, in order to understand whether competition law has been violated, it is essential to define the relevant markets. Second, because competition law only applies to a sport “in so far as it constitutes an economic activity,”⁹⁰ it must be determined whether the FFP rules involve an economic activity. In the next subsection, Article 101 will be summarized and an assessment will be made as to whether the FFP rules violate Article 101. The last portion examines potential defenses that UEFA would have against such claims, including the possibility of receiving an exception provided by Article 101(3).

A. *Relevant Markets*

There are three main parties that could potentially complain to the Commission about a competition law violation by the FFP rules: clubs, players, and sponsors. In order to determine the relevant market, it is important to do so for all three groups. Guidance from the Commission shows how this is to be done.

When defining the relevant market, the Commission measures the relevant

88. Closson, *supra* note 84, at 181.

89. See LENNART RITTER & W. DAVID BRAUN, EUROPEAN COMPETITION LAW: A PRACTITIONER’S GUIDE 98 (3d ed. 2004).

90. *Commission White Paper on Sport*, *supra* note 82, at 13.

geographic market and product market.⁹¹ The geographic market “comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.”⁹² It is important to point out that the FFP rules do not deal directly with competition on the field; they govern financial competition and, in essence, what clubs can spend on their players. Because all UEFA member leagues must abide by the same rules regarding finances, player transfers and signings, and so forth, the conditions for competing for players are homogenous across UEFA even if the level of play on the field and the quality of competition in each league are not. It is therefore logical to define the geographical market in this situation as the countries whose national football associations make up UEFA.

The product market “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use.”⁹³ This can be difficult to define because of different levels of quality among the clubs, leagues, and players, but it is important to remember that the FFP rules deal with financial transactions. These definitions, however, are for general purposes in completing this competition law analysis.

The products that clubs seek in terms of the FFP rules are professional football players. If a club cannot acquire one professional player that it wants at the price it is willing to pay, it seeks another who meets its requirements. It is impossible to define the substitutability on specific terms because, unlike identical widgets that come from multiple factories, each player is unique. But generally speaking, professional football players playing in UEFA member leagues are interchangeable depending on their skills, position, price tag, and so forth. The product market for clubs should be defined as professional football players.

For players, the product market must be defined in terms of the services they provide for pay. Just as players can be interchangeable for a club, a club and the salary it pays can be substitutable for a player. Depending on the price, location, management, and other issues, if a player finds that a club cannot meet his needs, he can find another club that does. Player salaries and the mobility of players at the right price are what will be impacted by the FFP rules. The products, therefore, for players are UEFA’s clubs who pay for the players’ services.

91. *Definition of Relevant Market*, EUROPA, http://europa.eu/legislation_summaries/competition/firms/126073_en.htm (last updated Apr. 20, 2011).

92. *Id.*

93. *Id.*

For sponsors, the product market relates to what they are paying for: publicity and visibility. While the more prestigious clubs will provide more publicity for a sponsor's name on a jersey or stadium, clubs can be interchangeable for these sponsors based on the price and branding opportunities that exist. Sponsoring Manchester United will bring more visibility and cost more to a sponsor than sponsoring a small club from Malta, but in general terms, the product market for sponsors is exactly what the FFP rules could affect: UEFA's clubs who take sponsors' money in exchange for naming rights to stadiums, jerseys, and so forth.

B. Economic Activity

The Commission has stated that “[c]ompetition law and Internal Market provisions apply to sport in so far as it constitutes an economic activity.”⁹⁴ The Court of Justice has said that “any activity consisting in offering goods or services on a given market is an economic activity.”⁹⁵ UEFA is clearly engaged in economic activities in its implementation of financial controls over its clubs. UEFA also performs economic activities in governing two European club tournaments, which consists of offering goods (merchandise) and services (football matches), and determining who plays in them based on the FFP rules. The Commission has also stated explicitly that UEFA “engages directly in economic activities.”⁹⁶ Because the FFP rules directly relate to who can participate in these tournaments and how each club can spend its money—or money it does not have—the FFP rules should be considered to relate to an economic activity.

C. Article 101

Article 101(1) of the Treaty on the Functioning of the European Union prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”⁹⁷ In order to determine if the FFP rules violate Article 101(1), it is necessary to analyze the article's requirements separately. The FFP rules do present some problems under Article 101(1) because they are anticompetitive in many ways.

94. *Commission White Paper on Sport*, *supra* note 82, at 13.

95. Case C-49/07, *Motosykletistiki Omospondia Ellados NPID v. Dimosio*, 2008 E.C.R. I-4863, ¶ 22.

96. Commission Decision (EC) 2003/778, 2003 O.J. (L 291) 25, 42.

97. Treaty art. 101(1).

1. Agreements Between Undertakings

Article 101(1) prohibits “agreements between undertakings” that have the requisite anticompetitive object or effect.⁹⁸ The Court of Justice defines an undertaking as “any entity engaged in an economic activity.”⁹⁹ As seen above, UEFA is engaged in economic activity by regulating the finances of its clubs and hosting tournaments that include clubs that comply with the FFP rules.¹⁰⁰ The Commission has also stated that each football club and national association is an undertaking.¹⁰¹ Also, because national associations are considered both undertakings and associations of undertakings, UEFA is, therefore, an undertaking, an association of undertakings, and an association of associations of undertakings.¹⁰²

For an agreement to exist under Article 101, “it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way.”¹⁰³ With UEFA sponsoring the rules, the European Club Association (representing the clubs), the European Professional Football Leagues (representing the national associations), and FIFPro Europe (representing the players) unanimously agreed to the rules which would govern clubs’ financial behavior.¹⁰⁴ It is clear that these undertakings “have expressed their joint intention to conduct themselves on the [European football] market in a specific way.”¹⁰⁵

2. Affect Trade Between the Member States

Any agreement between undertakings must also “affect trade between the Member States” in order to fall under Article 101(1).¹⁰⁶ Advocate General Lenz has said that agreements meet this requirement “only if they are ‘capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States.’ The adverse effect must also be appreciable.”¹⁰⁷

98. *Id.*

99. *Dimosio*, 2008 E.C.R. ¶ 21 (citations omitted).

100. *See supra* Part IV.B.

101. *EC 2003/778*, 2003 O.J. (L 291) at 42.

102. *Id.*

103. Case T-7/89, *SA Hercules Chem. NV v. Comm’n*, 1991 E.C.R. II-1711, ¶ 256.

104. *Green Light for Financial Fair Play*, UEFA.COM (Sept. 5, 2009), <http://www.uefa.com/uefa/stakeholders/professionalfootballstrategyCouncil/news/newsid=879610.html>.

105. *SA Hercules Chem. NV*, 1991 E.C.R. ¶ 256.

106. Treaty art. 101(1).

107. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶ 260 (quoting Case C-22/78 *Hugin v. Comm’n* 1979 E.C.R. 1869, ¶ 17).

There is significant evidence in favor of the argument that the FFP rules are capable of threatening trade in each of the three relevant markets and that the effect is appreciable.

Regarding the product markets for players and clubs, the FFP rules clearly have an appreciable impact on the trade of services between the two groups. A number of player transfers occur between clubs from different EU member states, as four of the five most expensive transfers ever fall into this category.¹⁰⁸ In terms of appreciable effect, in 2012, English Premier League clubs spent seventy percent (£60 million) less on player transfers than they did in the 2011 transfer window due in large part to the new FFP rules.¹⁰⁹ The FFP rules clearly have reduced spending, and this inevitably has an impact on the internal market in terms of football players and clubs.

A seventy percent reduction in spending must be considered appreciable, and clubs are limited in what they can do with their money even if rich enough to compensate for budget deficits. As one commentator said, “What [the FFP rules] means is that in the future it will become much harder for billionaires to buy middling mid-table clubs—think Malaga, Paris Saint-Germain, Manchester City—and turn them into giants and start beating up on everybody else.”¹¹⁰ Furthermore, if UEFA ever decides to impose a transfer ban as a penalty for falling short of the break-even requirement, as UEFA has considered,¹¹¹ non-compliant clubs would not be able to purchase players. Players would be limited in their options of choosing a club and that would impact the markets for players and clubs between member states even more.

Sponsorship deals have already been a point of debate in regard to their role in the FFP rules.¹¹² Some fear that sponsorship deals will be “inflated” to provide a club with additional income to spend in order to get around the FFP rules.¹¹³ The clubs that receive large sponsorship deals like Manchester City’s £350 million deal with Etihad Airways for ten years of jersey, stadium, and

108. See Keesh Sundaresan, *10 Most Expensive Transfer Deals in the History of Football*, LIVE SOCCER TV (Feb. 2, 2011), <http://www.livesoccertv.com/news/2657/10-most-expensive-transfer-deals-in-the-history-of-football/>.

109. *Football Transfer Dealings Plummet in January Window*, CNN U.S. (Feb. 1, 2012), http://articles.cnn.com/2012-02-01/football/sport_football_football-transfer-window-dealings_1_clubs-thiago-motta-spending?_s=PM:FOOTBALL.

110. Schaerlaeckens, *supra* note 15.

111. Paul Kelso, *Uefa Shelves Proposals to Impose a Transfer Ban on Clubs that Breach Its Financial Fair-Play Rules*, TELEGRAPH (U.K.), Nov. 23, 2011, at 9.

112. Andrew Nixon, *Sponsorship: FFP and Competition Rules*, SPORT LAW. (Aug. 11, 2011), <http://www.mondaq.com/x/142396/Antitrust+Competition/The+Sport+Lawyer+Sponsorship+FFP+and+Competition+Rules>.

113. *Id.*

practice facility naming rights¹¹⁴ argue that “market forces dictate what they can and cannot command for the naming rights to their stadium”¹¹⁵ While some argue that UEFA should be skeptical of large sponsorship deals like Manchester City’s,¹¹⁶ the FFP rules could influence sponsorship deals that occur across member states.¹¹⁷ Any restriction of these sponsorship deals could have an appreciable effect considering the prices sponsors like Etihad Airways pay for naming and other rights.

The agreement between undertakings regarding the FFP rules will affect the markets for players, clubs, and sponsorships. Because of the nature of today’s football markets throughout Europe, the rules are clearly “capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States” with “appreciable” impact.¹¹⁸

3. Object or Effect Is the Prevention, Restriction, or Distortion of Competition

Determining whether the object of an agreement is to distort competition requires an analysis of “the nature of the measure and the aims which it pursues, in the light of the economic context in which it was to be applied.”¹¹⁹ The economic context that UEFA’s FFP rules have been born into is one of instability. It is understandable that UEFA would want to implement rules to prevent clubs and leagues from going bankrupt.

In performing this analysis, it also is necessary “to consider the precise purpose of the agreement” in order to determine if its object is to harm competition.¹²⁰ The objectives that UEFA has stated for its FFP rules can serve as a source for the precise purposes, the first two of which are “to introduce more discipline and rationality in club football finances [and] to

114. Ian Ladyman, *Manchester City Defend £350m Etihad Stadium Deal as UEFA Plot Investigation*, MAIL ONLINE (Aug. 16, 2011), <http://www.dailymail.co.uk/sport/football/article-2026782/Manchester-City-defend-Etihad-Stadium-deal.html>.

115. Nixon, *supra* note 112.

116. *See id.* The man in charge of enforcing the FFP rules is already skeptical of the Manchester City deal. Slater, *supra* note 67.

117. For example, Real Madrid in Spain has as its current jersey sponsor an Austrian gambling company (bwin), and the previous sponsor was BenQ, a German company. Matt Cutler, *Real Madrid Extends bwin Shirt Sponsorship*, SPORT BUS. (Sept. 29, 2009), <http://www.sportbusiness.com/news/170577/real-madrid-extends-bwin-shirt-sponsorship>.

118. Case C-415/93, *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶ 260 (quoting Case C-22/78 *Hugin v. Comm’n* 1979 E.C.R. 1869, ¶ 17).

119. Case T-368/00, *Gen. Motors Nederland BV v. Comm’n*, 2003 E.C.R. II-4491, ¶ 102.

120. Case C-501/06 P, *GlaxoSmithKline Servs. Unlimited v. Comm’n*, 2009 E.C.R. I-9291, ¶ 55.

decrease pressure on salaries and transfer fees and limit inflationary effect.”¹²¹

The Commission has also said that the object of an agreement violates 101(1) if “by their very nature [the rules] have the potential of restricting competition.”¹²² These stated objectives appear problematic under this definition. Some of UEFA’s intentions in bringing about the FFP rules were to stop salaries from increasing and to, in essence, decrease spending by football clubs. This appears to restrict competition because clubs are prevented from spending what they want, and they cannot keep up with clubs that have more revenue.¹²³ The players are also prevented from getting the salaries that they could on a free market because of the FFP rules.¹²⁴

Additional guidance from the Commission similarly points to the possibility that the object of the FFP rules is anticompetitive: “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)].”¹²⁵ 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,¹²⁶ some objects of the rules are to restrict competition.

If the object of the FFP rules was to prevent, restrict, or distort competition, or if UEFA’s anticompetitive objects outweigh the procompetitive justifications for the restrictions, then the agreement would violate Article 101(1) even if there were no anticompetitive effects.¹²⁷ However, because it is unclear if the Commission or the Court of Justice would find the object of the FFP rules to be restrictive, and for the sake of completeness, it is important to look at the effects analysis under Article 101(1).

121. *Financial Fair Play*, *supra* note 30.

122. Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 100 [hereinafter Article 101(3) Guidelines].

123. Daniel Geey, *UEFA Financial Fair Play: Are the Rules Anti-Competitive?*, BEYOND THE PITCH (July 14, 2011), <http://www.beyondthepitch.net/articles/post/index.cfm/2011/07/14/uefa-financial-fair-play-are-the-rules-anti-competitive/>.

124. Stefan Szymanski, Professor, U. Mich., Presentation at Cass Business School: An Assessment of UEFA’s Financial Fairplay Rules, *available at* http://www.playthegame.org/fileadmin/image/knowledgebank/Challengesforfootball_pdf/Stefan_Szymanski.pdf.

125. Article 101(3) Guidelines, *supra* note 122, at 99.

126. *Financial Fair Play*, *supra* note 30.

127. Article 101(3) Guidelines, *supra* note 122, at 98.

In order for there to be an effect that meets the Article 101(1) requirement, “it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent.”¹²⁸ Furthermore, the agreement can still be found in violation of competition law if there are prospective negative effects, which the Commission refers to as “likely anti-competitive effects.”¹²⁹ Despite their short existence, there is already some evidence that the rules have had an impact on competition in the market for players between clubs. Clubs in the English Premier League and other major leagues are spending less on player transfers in large part because of the FFP rules.¹³⁰ The clubs spent an estimated £60 million less on player salaries in 2012 than in 2011, a seventy percent decrease.¹³¹ This is not due to a lack of marquee players; rather, this season is the first reporting period for the FFP rules, and clubs are trying to abide by the rules.¹³² This clearly restricts and prevents the ability of club owners to spend what they want on their clubs and to compete with other clubs for players.¹³³

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.¹³⁴ It follows, therefore, that the rich clubs will acquire the best—and most expensive—players and continue to make money. The poorer clubs are forced to live with low income because nothing but increased revenue will permit them to spend more money to acquire better players, and owners cannot offer their own funds to help the team get out of this hole. 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.¹³⁵

The market for players in determining which clubs to play for also appears

128. Case C-501/06 P, *GlaxoSmithKline Servs. Unlimited v. Comm'n*, 2009 E.C.R. I-9291, ¶ 55.

129. Article 101(3) Guidelines, *supra* note 122, at 100.

130. *Football Transfer Dealings Plummet in January Window*, *supra* note 109.

131. *Id.*

132. *Id.*

133. Geey, *supra* note 123.

134. *Id.*

135. Manchester United received €53.197 million in television revenue and award money for finishing in second place in the Champions League in 2011. Gavin Hamilton, *UEFA's Financial Fairplay Regulations Miss the Target*, WORLD SOCCER, <http://www.worldsoccer.com/columnists/uefas-financial-fairplay-regulations-miss-the-target> (last visited Nov. 14, 2012).

to be restricted. Clubs have already decreased their spending more than in the past and more than they presumably would if there were no regulations governing their finances.¹³⁶ If clubs are spending less, it appears that players' options and mobility will be more limited in terms of the quantity of clubs seeking their services or in terms of lower salaries. This result would not occur if not for the rules,¹³⁷ and the rules prevent players from competing with others on the open market and getting the salary market forces would provide.¹³⁸

The rules have only been in place for a short time and the future will tell whether the effect is to prevent, restrict, or distort competition. There are some foreseeable scenarios that could create other problematic effects, and the likelihood of anticompetitive effects is enough to trigger an Article 101(1) violation.¹³⁹ The most obvious is a situation in which a club is excluded from a tournament for failing to meet the break-even requirement. 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.

Sponsors might also have reason to complain about the FFP rules depending on how they are administered. As mentioned above, sponsorship deals are now under greater scrutiny and skepticism because some believe clubs will use them to get around the FFP rules.¹⁴⁰ While there is no evidence that UEFA has the authority to annul a sponsorship deal that has this intent, some believe that it should have that power.¹⁴¹ Even if UEFA does not have that power but decides to somehow modify the numbers of the club's break-even analysis, the effect of the rules in that situation would be to prevent and restrict sponsors and clubs from entering into sponsorship agreements for football jerseys and stadiums. This is a restriction on competition and would be problematic under Article 101(1).

It is possible that other problems with Article 101(1) will arise once the FFP rules have had more of an impact on football competition both on and off the field. For now, it is clear that there are competition law problems for UEFA and its rules.

136. See Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-4921, ¶ 286.

137. See *id.*

138. UEFA's "Financial Fair Play Regulations": *Finally a Fair Playing Field?*, UNIV. OF EDINBURGH SCH. OF L. (Nov. 3, 2010, 10:13 AM), <http://www.law.ed.ac.uk/courses/blogs/sportandthelaw/blogentry.aspx?blogentryref=8438>.

139. Article 101(3) Guidelines, *supra* note 122, at 98.

140. *Manchester City*, *supra* note 65.

141. *Id.*

D. UEFA's Defenses to Potential Article 101(1) Claims

Despite the potential competition problems its FFP rules face, UEFA does have two main defenses to potential Article 101(1) violations.

1. The Clubs and Players Agreed to the FFP Rules

The best defense UEFA would have in the face of an Article 101(1) complaint is that the clubs agreed to the FFP rules.¹⁴² UEFA and the European Club Association (ECA), which represents European clubs, worked together to formulate the FFP rules, and both sides made concessions over what the FFP rules would cover and entail.¹⁴³ The clubs and other parties involved in the negotiations over the FFP rules unanimously agreed to them.¹⁴⁴ It would be difficult for a club to claim a violation under these FFP rules when it agreed to them.¹⁴⁵ Furthermore, the European Commission considers clubs as undertakings,¹⁴⁶ and UEFA can be considered an association of associations (national leagues) of undertakings (clubs) under Article 101(1).¹⁴⁷ 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.

UEFA could also defend against an Article 101(1) claim brought by a player by arguing that the players agreed to the FFP rules through their players' association, FIFPro, which was active in the agreement on the rules.¹⁴⁸ The players are not undertakings under Article 101(1) and, therefore, would not find themselves in the same awkward position of the clubs. In any case, it would be interesting to see how the Court of Justice would rule on a situation in which the player bringing the case technically agreed to the rules through FIFPro.

The acceptance of the players and clubs is a defense that UEFA can surely use to undermine a complaint by either group. It is unclear how influential this defense would be at the Commission or the Court of Justice. However,

142. See Daniel Geey, *The UEFA Financial Fair Play Rules: A Difficult Balancing Act*, 9 ENT. & SPORTS L.J. 50, 56–57 (2011) (Eng.), available at <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume9/number1/geey/>.

143. *Id.*

144. *Green Light for Financial Fair Play*, *supra* note 104.

145. *See id.*

146. Commission Decision (EC) 2003/778, 2003 O.J. (L 291) 25, 42.

147. *Id.*

148. *Green Light for Financial Fair Play*, *supra* note 104.

regardless of these parties' acceptance of the FFP rules, the Commission has the authority to enforce competition law and would not be prevented from investigating the FFP rules if it estimated that there might be violations.¹⁴⁹ In any case, it is a useful defense for UEFA. Also, sponsors have not agreed to these FFP rules, and their complaints about violations of Article 101(1) could not be met with the same defense.

2. Article 101(3)

UEFA can also seek protection under Article 101(3), which provides an exception to a violation of Article 101(1). Article 101(3), in its relevant parts, says that 101(1) is "inapplicable" when the anticompetitive agreement or behavior at issue "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"¹⁵⁰ Furthermore, the behavior must not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" or "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."¹⁵¹ If an agreement that violates Article 101(1) meets these requirements, then it "shall not be prohibited, no prior decision to that effect being required."¹⁵² These "agreements are valid and enforceable from the moment that the conditions of [Article 101(3) of the Treaty] are satisfied and for as long as that remains the case."¹⁵³

According to the European Commission, these Article 101(3) requirements amount to a balancing of procompetitive benefits and anticompetitive effects, and only the four requirements imposed by the article are analyzed.¹⁵⁴ Each requirement will be analyzed separately here to determine whether UEFA's FFP rules would qualify for this protection.

a. Efficiency Gains

In order to qualify as an efficiency gain, the "restrictive agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress. The provision refers expressly

149. See *Directorate General for Competition*, *supra* note 81.

150. Treaty art. 101(3).

151. *Id.*

152. Council Regulation 1/2003, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, 7.

153. Article 101(3) Guidelines, *supra* note 122, at 98.

154. *Id.*

only to goods, but applies by analogy to services.”¹⁵⁵ Furthermore, each efficiency claim must have the following:

- (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.¹⁵⁶

UEFA would argue that the nature of the efficiency gained in this situation is the financial viability of football in Europe, which is an objective benefit as required under this analysis.¹⁵⁷ The rules specifically state what clubs can and cannot do financially, and they give clubs incentives to invest in development of younger players and similar long-term investments that can help a team maintain economic strength for longer periods of time.¹⁵⁸ This stability is certainly an efficiency that can help the economic progress of football, at least on paper.

The link between this efficiency and the FFP rules is clear and direct: the rules have been created with the direct purpose of making sure that clubs survive financially.¹⁵⁹ The likelihood of the efficiency is relatively high; the rules have already stopped many clubs from spending as much as usual,¹⁶⁰ and clubs have a strong incentive to obey so that they can participate in UEFA's tournaments. The magnitude is also likely to be far-reaching because the rules apply to all clubs who form the national associations of UEFA.¹⁶¹ The timeframe for achieving the efficiency is clearly set out in measuring periods in the FFP rules, and the intention is to bring clubs to financial stability within a certain amount of years or to impose sanctions.¹⁶² It is hoped that, although some financial restraints are placed on the clubs, the FFP rules will lead to stable economic progress in the sense that all clubs will be more financially responsible and that the sport will prosper.¹⁶³ Time will tell if this will happen, but for now, it appears that the FFP rules constitute an efficiency

155. *Id.* at 104.

156. *Id.* at 105.

157. *See id.* at 104.

158. *Financial Fair Play*, *supra* note 30.

159. *See id.*

160. *Football Transfer Dealings Plummet in January Window*, *supra* note 109.

161. FFP RULES art. 57(1) (2010).

162. *Id.* art. 61.

163. *See Financial Fair Play*, *supra* note 30.

because they create benefits for the football economy.¹⁶⁴

b. Fair Share to Consumers

The FFP rules must also benefit the consumers.¹⁶⁵ The consumers are “all direct or indirect users of the products covered by the agreement”¹⁶⁶ If the FFP rules leave these consumers in a worse position than they would be without the rules, then this condition is not met.¹⁶⁷ This is analyzed based on the “overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers.”¹⁶⁸

The products in this case can be many: football for the fans, players for the clubs, clubs for the players, and sponsorship deals for the sponsors. UEFA would argue that all parties will be better off because football will be more stable. However, the rules restrict many clubs’ abilities to compete with powerhouses by spending more than they earn to acquire better players. This, it can be argued, hurts consumers because their club could be better without the FFP rules. The FFP rules also appear to harm players, clubs, and sponsors by placing restrictions on the amount of money they can spend and receive. The FFP rules are not old enough to know for sure what the benefits are, and time will tell if these parties benefit from the stability or are harmed by the restrictions.¹⁶⁹

c. Indispensable Restrictions

Determining if the restrictions are indispensable involves a two-part test: “First, the restrictive agreement as such must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies.”¹⁷⁰ Some commentators argue that the FFP rules are not reasonably necessary to stop clubs from going into debt. For example, some say that alternatives used in other professional sports like a luxury tax for teams that overspend or revenue sharing between rich and poor teams could work within UEFA.¹⁷¹ Others suggest that by getting rid of the

164. See Article 101(3) Guidelines, *supra* note 122, at 102.

165. See *id.*

166. *Id.* at 109.

167. *Id.* at 110.

168. *Id.*

169. See Geey, *supra* note 123.

170. Article 101(3) Guidelines, *supra* note 122, at 107.

171. UEFA’s “Financial Fair Play Regulations”: Finally a Fair Playing Field?, *supra* note

transfer window, the time period in which transfers can be made, much of the inflated salaries and financial pressure will alleviate themselves naturally.¹⁷² Because these alternatives could have an effect similar to the FFP rules while serving as a “less restrictive means of achieving the efficiencies,” this seems to make the FFP rules dispensable.¹⁷³ In terms of the second part of the test, the restrictions on competition do appear to be reasonably necessary to achieving the goals of the FFP rules, but there are less restrictive alternatives of achieving the same efficiency.

d. No Elimination of Competition

In order to receive the 101(3) protection, the FFP rules “must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned.”¹⁷⁴ The possibility of eliminating competition is significant here. Clubs from smaller markets usually have smaller stadiums and less revenue.¹⁷⁵ 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. These natural advantages are not necessarily anticompetitive; what eliminates competition is that the FFP rules prevent clubs with less revenue from spending anything beyond their income in order to acquire a larger market share and attract more revenue.

It is not surprising that clubs with wealthy owners, who have already spent in excess of income, are supporting the rules. They presumably have done so in order to gain an advantage by spending loads of money before the rules were implemented and, thus, catapulting themselves into a better position before they had to obey the rules. Other clubs can no longer do the same.¹⁷⁶ The FFP rules essentially lock clubs into their current positions of profitability because they cannot spend more than their current income to get more visibility, success, and, ultimately, profit.¹⁷⁷ This presents the possibility of eliminating many clubs from ever being able to legitimately compete with the

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172. Tom Barnard & Andrew Nixon, *Are the UEFA FFP Regulations Being Ignored?*, THOMAS EGGAR (Feb. 2012), <http://www.thomaseggar.com/ebulletins/the-sport-lawyer---are-the-uefa-ffp-regulations-being-ignored->.

173. Article 101(3) Guidelines, *supra* note 122, at 108.

174. *Id.* at 113.

175. *UEFA's Financial Fair Play—The Usual Suspects Have Their Say*, TWOHUNDREDPERCENT (June 8, 2010), <http://www.twohundredpercent.net/?p=6929>.

176. *See id.*

177. Geey, *supra* note 123.

larger clubs for the best players and with each other on the field.

Furthermore, even if an owner wants to build a bigger stadium for more revenue, only the finance costs¹⁷⁸ of building a stadium can be taken out of the calculation of relevant expenses under the FFP rules if they “have been expensed in a reporting period rather than capitalised as part of the cost of the [stadium].”¹⁷⁹ Even if they were able to build a stadium within these restrictions, they will still need a club that people want to see play. While UEFA says that the FFP rules are supposed to help competition, it seems likely that they will only lock each club into its current position with little wiggle room to move up or down because of restraints on spending.¹⁸⁰ Also, because of the amount of clubs in UEFA that are effected, the FFP rules do appear to eliminate competition “in respect of a substantial part of the products concerned.”¹⁸¹

V. CONCLUSION

It is understandable that, considering the current financial situations of many football clubs, UEFA would want to create rules that protect these clubs and the product their fans consume. However, this must be done within the confines of competition law. The purpose of this Article was to analyze whether this was done, both in terms of what protection, if any, the European Commission gave to the rules and also if the rules violated Article 101 of the Treaty.

Regarding the question of whether the FFP rules enjoy a competition law exemption, it is clear that, contrary to what some think, the Commission did not extend such an exemption or approval to the FFP rules. The joint statement from UEFA and the Commission only refers to the rules’ compatibility with state aid law and mentions nothing about competition law. The Commission has the authority to enforce EU competition law,¹⁸² and nothing suggests it will not do so here if it feels that the rules violate Article 101.

The answer to the second question of whether the FFP rules violate Article 101 is that the rules are anticompetitive. Article 101(1) prohibits agreements between undertakings that restrict, prevent, or distort competition.¹⁸³ The FFP

178. These include “interest and other costs incurred by an entity in respect of the borrowing of funds” FFP RULES annex X(C)(1)(e).

179. *Id.* annex X(C)(1)(j).

180. Geey, *supra* note 123.

181. *See* Article 101(3) Guidelines, *supra* note 122, at 114.

182. *Directorate General for Competition*, *supra* note 81.

183. Treaty art. 101(1).

rules represent the agreement of a number of undertakings, and the effect of the rules restrict, prevent, and distort competition. The FFP rules restrict competition between clubs for players because the clubs cannot spend what they want on players, and only some can afford the better players while the rest are prevented from keeping up by the rules.¹⁸⁴ The FFP rules also likely distort competition by preventing owners of poorer clubs from increasing revenue by injecting their own cash to buy better players and, thus, lock the clubs more or less into their current financial situation.¹⁸⁵ The FFP rules also harm the market for player services by preventing players from receiving what they would in salary terms in an open market without restrictions and could harm the market for sponsorships if UEFA becomes more involved in regulating deals between clubs and sponsors.

UEFA does have an effective defense against clubs and players by showing that they agreed to the FFP rules,¹⁸⁶ which could undermine any complaints about the FFP rules. However, it is unclear how effective the defense would be at the Commission or the Court of Justice, and the Commission can still investigate the competition law concerns relating to the rules regardless of the parties' agreement to them. Also, it is unlikely that Article 101(3) protection would be applied because the rules appear to eliminate competition and do not appear to be indispensable to achieving financial stability.¹⁸⁷ Because it did not say anything about the FFP rules and competition law when it had the chance, the Commission's stance on the position has not been defined. However, Commission guidelines and Court of Justice case law applied to these facts suggest that the FFP rules do more harm than good to competition in European football.

184. See Geey, *supra* note 123.

185. *Id.*

186. See Geey, *supra* note 142, at 56–57.

187. See Article 101(3) Guidelines, *supra* note 122, at 107, 114.