CATÓLICA
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INTRODUCING A SALARY CAP IN UEFA'S PROFESSIONAL FOOTBALL LEAGUES:

WOULD THE SPECIAL STATUS OF *LEX SPORTIVA* PREVAIL OVER EU LAW?

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APRIL 30 th 2018

Acknowledgements

Firstly, I would like to thank my Supervisor, Professor José Manuel Meirim, for his unconditional support, guidance and motivation provided throughout the whole project.

I would also like to thank Professor Stephan Weatherill, Professor Petros Mavroidis, Professor Rodney Fort and Professor Sherman J. Clark for their guidance, advices and availability.

In addition, thank you to Professor Luís Barreto Xavier, Tânia Godinho and everyone at Católica Global School of Law for the help and motivation provided.

Thank you as well to Stephanie Wiederhold, Theresa Kaiser-Jarvis, my research colleagues and everyone at the University of Michigan Law School who has helped during my stay as a Research Scholar. The weekly colloquiums and the daily interaction at the University of Michigan have made this one of the best experiences of my life, both professionally and personally.

Finally, but not least, I am extremely grateful to my parents for their unconditional support and love. They are the reason I was able to write this thesis.

Miguel Mota Marques

ABSTRACT

The relationship between the sporting governing bodies and the EU authorities has long been a tumultuous one. Sporting governing bodies have supported most of their controversial decisions on the doctrine of the specificity of sports, under which it has been hard to define a threshold for the legality of their actions. The introduction of Article 165 TFEU in 2009 and several prominent case law by the CJEU has helped to sustain this unique *sui generis* status of *lex sportiva* in the EU. In this context, the financial issues for clubs have arisen as one of the main topics in this controversial matter. This thesis seeks to embrace the specific issue of players' salaries in European football leagues, which have considerably increased in the recent past, and the acceptance of salary caps by EU law. Players' salaries represent the largest component of operating costs to club owners and salary caps place a limit on the amount of money that a club can spend on players' salaries. Salary caps are a unique area for social, economic and legal studies, and its impact has been widely acknowledged. This thesis provides a legal assessment on the current structure of UEFA's Financial Fair Play Regulations, with the break-even rule being considered as a soft type of salary cap, as well as a legal assessment on the eventual introduction of a hard salary cap. It concludes that the current Financial Fair Play Regulations are most likely in breach of EU law and that a hard salary cap will be a better candidate to qualify for an exemption under EU law and be deemed as legal. Nevertheless, it also concludes that the commonly known US hard salary caps are in fact soft types of salary caps and that the introduction of a truly hard salary cap in European football would be an innovative solution resulting in an uncertain legal assessment provided in a case-by-case analysis by the CJEU.

Keywords: Financial Fair Play, Football, *Lex Sportiva*, Salary Cap, Sports Law

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Abbreviations

CBA	Collective Bargaining Agreement
CJEU	Court of Justice of the European Union
EU	European Union
FFP	Financial Fair Play
FFPR	Financial Fair Play Regulations
FIFA	*Fédération Internationale de Football Association*
MLB	Major League Baseball
MLS	Major League Soccer
NBA	National Basketball Association
NFL	National Football League
NHL	National Hockey League
TFEU	Treaty of the Functioning of the European Union
UEFA	*Union des Associations Européennes de Football*
US	United States

1. INTRODUCTION

The relationship between finance and football is more relevant today than it has ever been. In the last couple of years, many clubs have reported catastrophic economic results, with deficits reaching unprecedented levels, even though football has been generating record revenues, with sports leagues having a major role in this regard.

In September 2009, to confront the threat of financial instability for clubs and competitions, the *Union des Associations Européennes de Football* (UEFA)'s Executive Committee approved the Financial Fair Play (FFP) model, which was finally approved by UEFA in 2010 and integrated into the club licensing regulations.[1] The Financial Fair Play Regulations (FFPR), a system of financial regulations that seeks to improve overall financial health of European club football[2], introduced the break-even requirement, a rule that is considered to be the cornerstone of the FFPR[3], which requests that clubs should live within their own means.[4] According to the break-even requirement, a club must be able to demonstrate that its relevant income balances with its relevant expenditure.[5]

These FFPR, however, have been suggested to raise concerns of compliance with European Union (EU) law, most significantly competition law issues and internal market issues, in a struggle that seems to have no near end at sight. In particular, FFPR's break-even requirement could be considered as a soft type of salary cap[6], fostering the increasing dispute between *lex sportiva*[7] and EU law.

In sports, the concept of "salary cap" is defined by the European Commission as "a limit on the amount of money a team can spend on player salaries, either as a per-player limit or a total limit for the team's roster (or both)".[8] Salary caps are common in professional sports leagues around the world, including sports such as American football,

[1] UEFA, *Club licensing: Ten years on,* Nyon, UEFA, 2015a, at 9.
[2] PEETERS; SZYMANSKI, "Financial fair play in European football", 2014, at 352.
[3] FRANCK, "Financial Fair Play in European Club Football - What is it all about?", 2014, at 3.
[4] *Ibid*.
[5] PEETERS; SZYMANSKI (2014), at 3.
[6] LINDHOLM, "The problem with salary caps under European Union Law: the case against financial fair play", 2010, at 190.
[7] SERBY, "The state of EU sports law: lessons from UEFA's 'Financial Fair Play' regulations", 2016, at 38-39: "The phrase 'lex sportiva' has been coined to describe the element of sporting self-regulation whereby the sporting world has carved a niche private legal order separate and apart from national, EU and international law".
[8] Commission Staff Working Document, The EU and sport: background and context, Accompanying document to the White Paper on Sport, COM (2007) 391 final, at note 210.

baseball, basketball, hockey, rugby and Australian football.[9] Nevertheless, salary caps have been uncommon in European sports.[10]

Salary caps have been part of US professional sports for a long time.[11] Nowadays, three of the four American major sports leagues have team salary caps: the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL). The Major League Baseball (MLB) is the only of these four major leagues that doesn't have some form of salary cap.[12] However, this league (and also NBA) has a luxury tax[13], a related concept which could be considered a soft salary cap as it discourages salary increases.[14]

It is important to note that most salary caps, as US salary caps, are payroll caps. Nevertheless, in this thesis, a broader salary cap approach is adopted to include all measures that limit how much money a club can spend on player salaries.[15] FFPR, and specifically the break-even requirement, do not stipulate a fixed maximum amount that clubs may spend on salaries. However, these rules "have the same effect and purpose as salary caps in other leagues: to limit how much money clubs can spend on player salaries".[16]

The main purpose of the thesis is to assess the legality of UEFA's break-even requirement, usually deemed as a soft type of salary cap, and to understand to what point the introduction of a hard salary cap would add some sort of benefit to the current rules, considering EU law.

As such, this work strongly relies on a comparative approach between the United States (US) and the European models for sports. FFPR have raised several EU law (in)compatibility issues and the eventual introduction of an American type of salary cap in European football surely adds to the debate. This has been a hot topic in the recent past due to the acknowledgeable fact that FFPR have failed to be fully effective and are legally

[9] BARTLETT; GRATTON; ROLF, *Encyclopedia of international sports studies: volume 3 P-Z*, 2006, at 1170.
[10] LINDHOLM (2010), at 190.
[11] *Ibid*., at Abstract.
[12] *Ibid*., at note 1.
[13] According to DIETL; LANG; WERNER, "The effect of luxury taxes on competitive balance, club profits, and social welfare in sports leagues", 2008, at 2: "A *luxury tax*, or competitive balance tax, is a surcharge on the aggregate payroll of a sports team that exceeds a predetermined limit set by the corresponding sports league".
[14] KESENNE, "The salary cap proposal of the G14 in European football", 2003.
[15] As LINDHOLM (2010).
[16] *Ibid*., at 191.

questionable.

This thesis is organized in five parts. The first part presents the origins of salary caps in North American professional sports leagues, as an integral part of a labor relations approach, the hard and the soft types of US salary caps, their impact on the competitive balance and the legal framework in US.

The second part consists of a comparison between the European and the North American models for sports, both describing their differences and some similarities.

In the third part of this work, an assessment on FFPR is provided, with a specific focus on the transnational legal issues involved in Europe. An overview of FFPR is initially provided, followed by a legal assessment on the validity of the break-even rule as a soft type of salary cap, under EU Competition Law and the EU Internal Market rules on free movement. The European Commission's position is then assessed, as well as the relevant legal challenges on FFPR, to this date.

In the fourth part of this work, the compatibility of introducing a hard salary cap in European football is assessed, both regarding EU Competition Law and the EU Internal Market rules on free movement, bearing in mind the exercise provided on the previous chapter. As such, it will be assessed in this chapter whether the introduction of a hard salary cap would more easily be exempted from the scope of EU law when compared to the current soft type of salary cap, the break-even requirement.

Finally, in the fifth and final part, some personal remarks and a conclusion are presented on what the future could uphold for salary caps in European football.

2. SALARY CAPS IN NORTH AMERICAN PROFESSIONAL SPORTS LEAGUES

2.1. Foundations of Salary Caps

The first salary cap in professional North American sports was introduced by the NBA in the 1984-1985 season[17], under an agreement reached in 1983[18], included in that year's Collective Bargaining Agreement (CBA). The second league of the four major leagues to adopt a salary cap was the NFL in 1994[19], under an agreement reached in 1993.[20] The NHL instituted a salary cap in its 2005 CBA.[21]

[17] STAUDOHAR, "Salary caps in professional team sports", 1998, at 3.
[18] WONG, *Essentials of Sports Law*, 2010, at 549.
[19] STAUDOHAR (1998), at 3.
[20] WONG (2010), at 559.

Until the mid-1970s, salaries in the major North American Professional sporting leagues were constrained by "reserve clauses", "the club's right to renew a contract for a one-year period under the same terms and conditions as the previous year of the contract"[22], except, eventually, the salary. However, at that time, various courts' rulings and negotiated agreements brought changes that led to the beginning of a new era of free agency.[23] Free agency resulted in an unprecedented rise in players' salaries.[24]

Salary caps emerged in these major leagues with the introduction of free agency and were set as a counterforce to the free movement of players.[25]

2.2. Salary Caps and the Collective Bargaining Agreement

Salary caps are negotiated in the league's CBA. The US CBA is a negotiated agreement that governs the relationship between employers and their employees.[26]

In sports, like in many other industries, unions represent the collective interests of employees. Athletes whose employers are the NBA, the NFL, the NHL, the MLB or the MLS (Major League Soccer), are unionized.[27] In North America, unions were relativity weak until the 1950s. They started to grow at that time and have grown significantly over the years.[28] In North America's professional sports leagues, one could say that CBAs create a binding system of laws and guidelines that govern the relationship between managements and unions.[29]

The collective bargaining (the process) and the CBA (the agreement) are extremely relevant in professional sports leagues and are usually the basis for determining the parameters of several matters, including salary caps, luxury taxes, free agency and salary arbitration.[30] Players' unions and owners are constantly negotiating these league policies and the conflicts between them have led to labor disputes and work stoppages, which

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[21] *Ibid.*, at 560.
[22] WONG (2010), at 847.
[23] BARTLETT; GRATTON; ROLF (2006), at 1170.
[24] *Ibid.*
[25] DIETL; DUSCHL; LANG, "Executive pay regulation: what regulators, shareholders, and managers can learn from major sports leagues", 2011, at 5.
[26] CHAMPION, *Fundamentals of Sports Law*, 2004, at chapter 18:2.
[27] ROSNER; SHROPSHIRE, *The Business of Sports*, 2011, at 299.
[28] SZYMANSKI, "The economic design of sporting contests", 2003, at note 37.
[29] ROSNER; SHROPSHIRE (2011), at 299.
[30] *Ibid*.

include strikes and lockouts. The salary cap has been the center of significant labor unrest since the 1980s.[31]

2.3. Types of Salary Caps

A distinction should be made with respect to the severity of the cap between hard and soft salary caps.[32] According to Staudohar, implementing a hard salary cap means that clubs are not allowed to spend more than the established salary cap and exceptions are not allowed, while implementing a soft salary cap means that it is possible for clubs to exceed the cap under certain conditions.[33]

Regarding the types of salary caps in US professional sports leagues, the NBA has a soft salary with numerous exceptions to the cap.[34] The NFL and the NHL have salary caps that have been named as hard salary caps. However, these caps also present several exceptions. The MLS has a salary cap with several exceptions. An example is the Designated Player Rule, adopted in the 2007 MLS season. This rule allows MLS clubs to exceed the salary cap to pursue high-profile players.[35]

As such, one should conclude in this regard that none of the major US professional sports leagues actually has a hard salary cap system implemented. While interviewing Professor Rodney Fort[36] for the purposes of this thesis, he has confirmed that from an economic perspective none of the salary caps in the US professional sports leagues are hard salary caps.[37] He stated that, in fact, "in the US, the cap is pretty weak". He also stated that "from the original design of US salary caps, there were exceptions". Fort considers that this is because "nobody wanted a hard salary cap" in US professional sports leagues. In that regard, he considers that salary caps in the US are payroll caps to deal with the "difference on revenues of teams".

2.4. Salary Caps and Competitive Balance

Competitive balance is an important topic and a widely used concept in the literature of professional team sports. According to Fort and Winfree, "the basic idea of competitive

[31] WONG (2010), at 559.
[32] DIETL; DUSCHL; LANG (2011), at 22.
[33] STAUDOHAR (1998), at 4-5.
[34] NBA, "CBA 101: Highlights of the 2011 Collective Bargaining Agreement between the National Basketball Association (NBA) and the National Basketball Players Association (NBPA)", 2014, at 5-8.
[35] BERNHARD, "MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?", 2007, at 425.
[36] Rodney Fort is Professor of Sport Management at the University of Michigan, School of Kinesiology. He is internationally recognized as an authority on sports economics.
[37] Rodney Fort, personal communication, Michigan, US, 6 March 2018.

balance is that teams are equal in terms of team quality, so that every team has about the same chance to win".[38] Clubs in a sports league must be not too strong or too weak relative to one another so that the uncertainty of the outcome is preserved.[39]

There is currently a debate between scholars about the importance and the benefits of competitive balance. According to Zimbalist, "competitive balance is like wealth. Everyone agrees it is a good thing to have**,** but no one knows how much one needs".[40]

Economic theory has posed serious doubt on the relationship between salary caps and competitive balance. According to Fort and Winfree "the policy devices used in the name of competitive balance (1) theoretically cannot change balance, and (2) actually have not changed balance, by looking at the data".[41] These authors affirmed that the only tool that could actually change balance in a significant way would be the introduction of a hard salary cap. However, this would be an innovative solution as US salary caps are not truly hard.[42] Accordingly, Staudohar affirmed that if a salary cap was enforced as a hard cap, the difference could be greater because this would apply as a direct limit.[43] The author concludes that "salary caps and payroll taxes may seem beneficial to owners, but their effects appear to be more symbolic and cosmetic than fundamental".[44]

2.5. The Legal Framework

Historically, antitrust law has been applied to professional sports leagues in the US, namely the NFL, the NBA and the NHL, but not to the MLB. In *Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs*[45], the Supreme Court famously ruled that organized baseball did not fall within the scope of antitrust law.[46] The basic federal antitrust law, the Sherman Antitrust Act, was enacted by the Congress in 1890.[47] In 1914, the Congress approved two additional antitrust laws: The Federal Trade Commission Act and the Clayton Act. With some amendments, these are the three-core federal antitrust laws still in effect as of today.

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[38] FORT; WINFREE, *15 sports myths and why they're wrong*, 2013, at 191.
[39] QUIRK; FORT, *Pay dirt: The business of professional team sports,* 1997, at 243.
[40] ZIMBALIST, "Competitive balance in sports leagues: an introduction", 2002, at 111.
[41] FORT; WINFREE (2013), at 206.
[42] *Ibid.*, at 206.
[43] STAUDOHAR (1998), at 10.
[44] *Ibid.*
[45] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).
[46] NAFZIGER, "A comparison of the European and North American models of sports organisation", 2008, 107.
[47] POSNER, *Antitrust Law,* 2009, at 33.

Labor and collective bargaining law is also a crucial feature for North American professional sports.[48] As previously mentioned, in the US, restraints on teams and players, such as salary caps, are largely premised in labor agreements within the scope of CBAs.

Indeed, under US sports law, antitrust law and labor law are very much related, although these two areas of law have an inherent conflict[49]: antitrust law promotes competition and condemns cooperation among competitors, while labor law encourages cooperation among competitors in employment.[50] According to Nafziger, although restraints on a market such as the sports industry may breach U.S. antitrust law, two antitrust law labor exemptions remove certain restraints on labor from this general policy: the statutory exemption and the non-statutory exemption.[51]

The "statutory labor exemption" was created under sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act.[52] Section 6 of the Clayton Act declares that "The labor of a human being is not a commodity or article of commerce"[53] and provides that the antitrust laws do not prohibit labor organizations.[54] The Norris-LaGuardia Act and Section 20 of the Clayton Act limit the ability of federal courts to enjoin certain labor-related activities.[55] The Supreme Court has interpreted these provisions to protect unilateral union conduct from antitrust challenges.[56] However, the statutory exemption only protected a labor organization's unilateral actions and not the agreements between unions and nonlabor parties. As such, it did not immunize the collective bargaining process or the CBA's themselves from potential antitrust liability.[57]

Later, in 1965, the US Supreme Court developed a judicially formulated addition to the statutory exemption, commonly referred to as the "non-statutory labor exemption"[58]. According to Feldman, «the Court held that "some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions . . . to give effect

[48] NAFZIGER (2008), at 105.
[49] FELDMAN, "Antitrust versus Labor Law in professional sports: balancing the scales after Brady v. NFL and Anthony v. NBA", 2011, at 1223.
[50] FELDMAN (2011), at 1227.
[51] NAFZIGER (2008), at 103.
[52] FELDMAN (2011), at 1228.
[53] CLAYTON ACT, 15 US Code, 2006, § 17.
[54] FELDMAN (2011), at 1228.
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*, at 1229.
[58] NAFZIGER (2008), at 115.

to federal labor laws and policies and to allow meaningful collective bargaining to take place"».[59]

These exemptions have been the heart of nearly all antitrust actions in professional sports. Nevertheless, as stated by Nafziger, it is worth mentioning that they have not always been applied consistently.[60]

3. THE EUROPEAN AND THE NORTH AMERICAN MODELS OF SPORTS

There are legal, cultural and social differences between the European and the North American sports' structures. Baseball, basketball, hockey and American football are the most popular sports in the US, while in Europe the most important sport usually is European football. Nevertheless, there are other relevant differences, namely different models of sports, which make European and US sports realities very different.

Firstly, the existence of voluntary clubs and associations in Europe (club structure) versus educational institutions such as schools, colleges and universities in the US (school structure).[61]

Secondly, the existence of associations as part of globally operating federations in Europe (association structure) versus franchises typically associated to personally owned businesslike leagues in the US (commercial structure).[62]

Thirdly, US professional sports are organized in closed leagues of competition, where the entry of new franchises or franchise relocation (the franchises have an exclusive territory[63]) is common and a purely commercial decision.[64] On the other hand, both amateur and professional leagues in Europe are built as open competitions, based on the principle of promotion and relegation[65], where clubs may move up or down yearly depending on their standing at the end of a season.[66]

Furthermore, North American professional sports leagues are nationally oriented. In contrast, European professional sports leagues are internationally oriented.[67]

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[59] FELDMAN (2011), at 1230.
[60] NAFZIGER (2008), at 103.
[61] VAN BOTTENBURG, Maarten, "Why are the European and American Sports Worlds so Different? Path-dependence in European and American Sports History", 2011, at 1.
[62] VAN BOTTENBURG (2011), at 4.
[63] PEETERS; SZYMANSKI (2014), at 348.
[64] BARROS; IBRAHÍMO; SZYMANSKI, "Transatlantic sport: an introduction", 2002, at 2.
[65] VAN BOTTENBURG (2011), at 1.
[66] NAFZIGER (2008), at 101.
[67] VAN BOTTENBURG (2011), at 16.

Also, US's professional leagues are organized and professionalized quite independently of the rest of the international sporting scene[68], whereas in Europe sports is traditionally organized in a pyramidal structure with four interdependent levels of professional and nonprofessional organizations.[69] Regarding football (soccer), one could say that the governance model of European football is hierarchical. The international governing bodies, *Fédération Internationale de Football Association* (FIFA) and UEFA, sit at the top of the pyramid. FIFA is the world's football governing body. UEFA is the governing body of football in Europe and is an umbrella organization for 55 national football associations across Europe.[70]

Another relevant difference is that US sports clubs were established under profit-oriented managerial control (profit maximizers), without any international regulatory body. On the contrary, in Europe, clubs are governed by international non-profit federations.[71]

In addition, the European sports model is based on the importance of regional identity and of national identity. However, this feature can be problematic due to the national rivalries that could take the form of spectator violence, intolerance, hooliganism or even racism.[72] In the US, this negative feature is mostly absent.

One should conclude that there are fundamental differences in the US and the European sports structures. However, there are increasingly relevant similarities due to the trends of globalization that continue both sides of the Atlantic, accelerating the convergence of the US and the EU sports structures at all levels.[73] This idea should be highlighted when eventually transplanting a typical US salary cap to the European structure.

4. FINANCIAL FAIR PLAY REGULATIONS IN EUROPEAN FOOTBALL

4.1. Introduction

Football is the most popular sport in Europe and in the world. Football governance was initially organized at the national level through national federations or associations. Later, international organizations such as FIFA (founded in 1904) and UEFA (founded in

[68] *Ibid.*, at 11.
[69] NAFZIGER (2008), at 100.
[70] UEFA, *About UEFA*. Retrieved from http://www.uefa.com/insideuefa/about-uefa/index.html
[71] VAN BOTTENBURG (2011), at 1.
[72] NAFZIGER (2008), at 102.
[73] *Ibid.*, at 108.

1954) were founded.[74] In Europe, there are many big clubs, world class players, high players' salaries and the income for big clubs has been increasing. Nevertheless, the financial state of European professional clubs seems to have deteriorated with many clubs suffering from financial crises. In 2008, UEFA's President Michel Platini stated that "the many clubs across Europe that continue to operate on a sustainable basis […] are finding it increasingly hard to coexist and compete with clubs that incur costs and transfer fees beyond their means and report losses year-after-year".[75]

In 2010, in this context of debt growing due to overinvestment by several clubs, UEFA announced a set of regulations, known as FFPR, intended to introduce more discipline and rationality to European football clubs' finances.[76] Several scholars have supported that overinvestment by clubs was the main reason for the introduction of the FFPR.[77] The idea under the overinvestment theory is that clubs are currently overspending on player salaries, which could ultimately lead to their bankruptcy. Consequently, this would put at stake the stability of the remaining clubs and the existing competitions. Szymanski has considered insolvency as an endemic problem for European Football.[78] However, the overinvestment theory has been deemed as inconsistent in the past and lacking concrete data analysis.[79] As such, as will later be assessed, this raises issues regarding the legality of FFPR.

4.2. An Overview

The FFP model was approved in September 2009 by UEFA's Executive Committee, which also created the UEFA Club Financial Control Body (CFCB) to oversee its implementation.[80] The FFP concept "has centered on the obligations for clubs, over a period of time, to balance their books or break even".[81]

The main objectives of FFPR can be summarized by analyzing Article 2(2) of FFPR, which states that the aim of these regulations is to achieve FFP in UEFA club competitions

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[74] MARKS, «UEFA, the EU and Financial Fair Play: "On ne dépense pas plus d'argent que l'on n'en génère!"», 2012, at 54.
[75] UEFA, *The European Footballing Landscape: Club licensing benchmarking report financial year 2008*, 2008, Foreword.
[76] PEETERS; SZYMANSKI (2014), at 345.
[77] CHAPLIN, "Financial fair play protects football's stability", 27 May 2010; ARNAUT, Independent European Sport Review, A report by José Luis Arnaut, 2006; or LINDHOLM (2010), for instance.
[78] SZYMANSKI, "Insolvency in English professional football: Irrational exuberance or negative shocks?", 2012, 1-36.
[79] LINDHOLM (2010), at 207.
[80] UEFA (2015a), at 9.
[81] *Ibid.*, at 12.

through: improving the economic and financial capability of clubs (increasing their transparency and credibility); placing the necessary importance on the protection of creditors and ensuring that clubs settle their liabilities with players, tax/social authorities and other clubs punctually; introducing more discipline and rationality in club football finances; encouraging clubs to operate on the basis of their own revenues; encouraging responsible spending for the long-term benefit of football; and protecting the long-term viability and sustainability of European football.[82]

A key feature and the most controversial aspect of the FFPR is the break-even requirement, a rule stipulated in Articles 58-64 of the FFPR[83] that requires clubs to balance their spending with their revenues, as well as restricts clubs from accumulating debt.[84] The break-even requirement is set according to a complex set of criteria and should result in a balanced spending and revenues outcome, which are calculated over a three-year period. The balance is subject to an acceptable deviation of €5 million. On the income side, gate receipts, TV revenues, advertising, merchandising, transfers of players, prize money and disposal of tangible fixed assets are taken in consideration. On the outgoings side, the purchase of players, employee benefits and wages, amortization of transfers, finance costs and dividends are considered.[85] Clubs not meeting these requirements face a range of sanctions applied by the CFCB, which could include the withholding of prize money (as it occurred with Sporting Clube de Portugal in 2012[86]), player transfer bans (as it occurred with FC Barcelona in 2014[87]), fines or even disqualification from UEFA's competitions.

For UEFA, since the implementation of the FFPR, significant results have been achieved.[88] Overall, overdue payables have decreased and aggregate losses have been cut.[89]

4.3. FFPR, *Lex Sportiva* and EU Law

It will now be assessed to what point these regulations raise concerns of compatibility with EU law. The question of whether FFPR are compatible with EU law

[82] UEFA, UEFA Club Licensing and Financial Fair Play Regulations: Edition 2015*,* Nyon, UEFA, 2015c, at 2.
[83] UEFA (2015c), at 36-40.
[84] UEFA, "Financial fair play: all you need to know", 30 June 2015, 2015b.
[85] INTERNATIONAL SPORTS LAW, "UEFA's Financial Fair Play rules & competition bans", 4 December 2016.
[86] THE PORTUGAL NEWS ON LINE, "UEFA withhold Sporting's prize money", 13 September 2012.
[87] RUMSBY, "Barcelona handed one-year transfer ban for breaking rules over international transfer of under-18s", 2 April 2014.
[88] UEFA (2015a), at 12.
[89] *Ibid*.

falls under a wider problem of the extent of the autonomy of sports governance, and to what point should it be covered by EU law.

4.3.1. FFPR and the Special Status of *Lex Sportiva*

Lex sportiva is a concept that "refers to the arrangements that define a sport´s operation".[90] According to Weatherill, *lex sportiva* is "made up of the rules and practices established by governing bodies and applied globally to ensure common treatment of a particular sport wherever it happens to be played".[91] It is not a law of a State and may come into conflict with the law of any State or with the law of an international organization, such as the EU.[92]

The emergence of EU sports law has its origins trace back to 1974 with the *Walrave* case.[93] In this landmark case, the Court of Justice of the European Union (CJEU) held that "the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty".[94] In 1995, *Bosman* also provided a landmark decision in which the CJEU ruled that transfer regulations represented an obstacle to a fundamental freedom, and therefore they had to be justified.[95] As Stephen Weatherill stated, the decision represented a shift from the test laid down in *Walrave* because the CJEU did not assess whether the transfer regulations were a purely sporting rule.[96] In *Walrave*, purely sporting rules were considered exempt from the scope of EU law. In *Bosman*, Advocate General Lenz had a particularly important perspective in this regard when he stated that professional football was "substantially different from other markets in that the clubs are mutually dependent on each other".[97] He also stated that some restrictions could be necessary to ensure the proper functioning of the sports industry.[98] Later, in *Meca-Medina*, the CJEU clarified its position by referring that it was "apparent that the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down".[99] As such, one can conclude that *Meca-Medina*

[90] WEATHERILL, *Principles and practice in EU Sports Law*, 2017, at 6.
[91] *Ibid.*
[92] *Ibid.*
[93] FOSTER, "Is there a global sports law?", 2012, p. 35-52.
[94] Case C-36/74, *Walrave*, [1974] ECR 1405, at Paragraph 1 (Operative Part).
[95] Case C-415/93, *Bosman*, [1995] ECR I-4921.
[96] WEATHERILL, "Fair Play please!: Recent developments in the application of EC law to sport", 2003, at 56.
[97] Opinion of Advocate General Lenz, Case C-415/93, *Bosman*, [1995] ECR I-4930, at Paragraph 270.
[98] *Ibid*.
[99] Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991, at Paragraph 27.

was crucial to comprehend the CJEU's stand that sporting rules should not be granted immediate immunity from the scope of EU law.[100]

Since then, *lex sportiva* has gained a special status according to International, European and national laws. A clear evidence is Article 165(1) of the Treaty of the Functioning of the European Union (TFEU), introduced in 2009, which states that "the Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function".[101] Thus, there is an inherent conflict (and a crossover area) between the laws of states and supranational authorities, and *lex sportiva* and sports authorities.

Article 165 TFEU was introduced as a formal but weak treaty competence for sports, which could be considered as "soft law". As such, it leaves open room for policy developments within the EU sports field. One must agree with García and Weatherill when they state that including a specific sporting competence in the Lisbon Treaty, with reference to the specificity of sports, had the purpose of helping to "preserve sport's autonomy, rather than because of any belief that the EU should assume a more active regulatory role". These authors refer this strategy as a method of "empowering the EU in order to restrain it".[102] Richard Parrish believes that "while EU sports law recognizes a territory of sporting self-regulation governed by the *lex sportiva*, it conditions this autonomy on the acceptance of the integration of general principles of law into the *lex sportiva* – such as proportionality and good governance".[103] This would help to make a case for the doctrine of the specificity of sports, further developed by the CJEU's rulings and the positions assumed by the European Commission.

EU law has been especially aggressive to the autonomy of sports authorities. To Weatherill, for instance, FFPR are "legally fragile" and vulnerable to challenges under EU law, as they fall into a grey regulatory area, inherent to the concept of soft law.[104] Therefore, it is for a competent judicial authority, such as the CJEU, to decide on the validity of these Regulations and its future in a case-by-case assessment.

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[100] We will take a deeper insight at *Meca-Medina* later on.
[101] Consolidated Version of the Treaty on the Functioning of the European Union, 2012, OJ C 326/47 [hereinafter TFEU].
[102] GARCÍA; WEATHERILL, "Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon, 2012, at 18.
[103] SERBY (2016), at 40.
[104] Stephen Weatherill, personal communication, Lisbon, Católica Global School of Law, 2015.

4.3.2. FFPR and EU Competition Law

The strongest concern raised by the critics of FFPR is the idea that FFPR are in breach of EU Competition Law, more specifically Articles 101 and 102 TFEU, as FFPR could constitute unnecessary anti-competitive agreements (Article 101 TFEU) or result in the abuse of a dominant position in the market (Article 102 TFEU), depending on whether UEFA's structure is to be considered horizontal or vertical in the market, by nature.

The anti-competitive effect of salary caps has been a long-debated issue in the US, with issues raising regarding the application of the Sherman Act. The most relevant antitrust provisions in the fields of sports for the Sherman Act are Section 1, regarding Restraint of Trade, and Section 2, regarding Monopolization. As Lindholm identified, in the field of sports, the Sherman Act rationale is very similar to the EU Competition Law provisions.[105]

4.3.2.1. Article 101 TFEU

Article 101 TFEU is the provision that raises the most complicated legal issues in several scholars' opinions. For instance, in Weatherill's opinion, FFPR could be a horizontal agreement between suppliers of sports services (in this case, clubs), which involves commitments restraining the spending, such as players' wages. This is also strengthened by vertical restraints enforced by UEFA (licensing requirements). FFPR also appear to be a restriction on the competition to acquire players, as clubs have reduced their investments, which subsequently affects players' salaries, depressing the levels of remuneration.[106] From an economic perspective, Peeters and Szymanski have assessed that FFPR are a form of market restraint and through a structural empirical model have proved that they substantially reduce competition, having as a consequence "lower average payrolls, while average revenues would hardly be affected".[107]

4.3.2.1.1. Undertaking/Association of Undertakings

At this stake, it's rather important to point out that for EU competition rules to apply, UEFA must be considered either an undertaking or an association of undertakings. The term "undertaking" has been given a broad interpretation by the CJEU. *Piau*[108] appears as

[105] LINDHOLM (2010), at 197.
[106] WEATHERILL (2017), at 274.
[107] PEETERS; SZYMANSKI, "Vertical restraints in soccer: Financial Fair Play and the English Premier League", 2012, at 1.
[108] Case T-193/02, *Piau*, [2005] ECR II-209, at Paragraph 72.

an especially important landmark case in this regard, as the CJEU considered that the national football associations, which are groups of football clubs to whom football is an economic activity, are associations of undertakings under the meaning of Articles 101 and 102 TFEU. Also, international sporting federations are to be considered as undertakings and associations of undertakings. In *Meca-Medina*, the Commission concluded that the International Olympic Committee (IOC) constituted an association of undertakings.[109] Therefore, one can conclude that FIFA, UEFA, and its member clubs, as entities engaged in economic activities, are to be considered as undertakings and associations of undertakings and are under the scope of the Treaty's provisions regarding agreements that restrict competition.

4.3.2.1.2. Concerted Practice/Decision which Affects Trade

The next step for an undertaking/association of undertakings to fall under the scope of EU Competition Law is that it must be a part of a concerted practice/agreement or take a decision which could affect trade and have as effect the prevention, restriction, or distortion of the market. In this regard, it is important to understand the concept of "agreement" and the broad interpretation that it has been given by the EU institutions (as the concept is not defined in the Treaties).

In several cases, the CJEU has used the expression "joint intention" to describe its understanding of the term agreement.[110] As such, considering the European sports structure, it is clear that this concept is applicable to the sports market in the EU. Nevertheless, as Lindholm stated, it is not crucial for the application of Article 101(1) TFEU that a soft/hard salary cap is imposed by an agreement.[111] Any "decision" to impose a soft/hard salary cap would have its effects considered under EU Competition Law as well.[112]

4.3.2.1.3. Relevant Market

Defining both the "relevant product market" and the "relevant geographic market" is also mandatory to any Competition Law assessment, in light of EU law. This has been acknowledged several times in the past by different European and national courts. In its "Notice on the definition of relevant market for the purposes of Community Competition

[109] Case C-519/04 P, *Meca-Medina*, at Paragraphs 37-39.
[110] See, for instance, Case T-41/96, *Bayer*, [2000] ECR II-3383, at Paragraphs 67-68.
[111] LINDHOLM (2010), at 198.
[112] PARRISH, *Sports law and policy in the European Union*, 2003, at 113.

Law" ("Notice"), the European Commission has provided the following definition for "relevant product market": "Relevant 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".[113]

In this regard, the Notice emphasizes the "substitutability" criterion to define the relevant product market. A question to consider is whether this definition applies to football players and whether a "substitutability" criterion would also be applicable. Richard Parrish considers three different markets to exist for sports: "the exploitation market", "the contest market" and the "supply market".[114] FFPR have an undeniable effect and are deeply connected to the "supply market".

In the same Notice, a definition for "relevant geographic market" is also provided: "The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area".[115]

As Parrish has stated, "the definition of the geographical market flows from that of the product market".[116] The author considers that "it is difficult to argue against the whole EU being considered the relevant geographical market for agreements concerning the sale of broadcasting rights, rules on international transfer and even ticketing arrangements for major international sporting events such as the football World Cup".[117] As such, one can conclude that the relevant geographic market in this regard includes all EU Member States.

Having defined both the relevant product market and the relevant geographic market, one must combine both to establish the relevant market. The same is explicit in the definition stipulated in the Notice: "The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definition in paragraphs 7 and 8

[113] Commission Notice On the definition of relevant market for the purposes of Community competition law, 1997 OJ C 372/3, at Paragraph 7.
[114] PARRISH (2003), at 119.
[115] Commission Notice (1997), at Paragraph 8.
[116] PARRISH (2003), at 119.
[117] *Ibid*.

(which reflect the case-law of the Court of Justice and the Court of First Instance as well as its own decision-making practice) according to the orientations defined in this notice".[118]

The assessment of the relevant market is a mandatory step to finally understand whether an agreement will result in a breach of Article 101(1) TFEU and whether an exception developed by the CJEU or Article 101(3) TFEU could eventually apply.

In this regard, it is important to bear in mind that the General Court has stated in *Lombard Club*[119] that the importance of defining the relevant market is different in Article 101 TFEU when compared to Article 102 TFEU. In *Lombard Club*, the Commission imposed millionaire fines on eight Austrian banks for participating in a price-fixing agreement, which constituted a cartel. The General Court (at the time, in 2002, the Court of First Instance) largely upheld the sanctions. In this case, a very wide definition for the relevant market was adopted which made it possible to apply sanctions to the various banks involved. As such, one should embrace this broad definition of market when applying it in an eventual breach of Article 101(1) related to the sports industry.

4.3.2.1.4. Object or Effect the Prevention, Restriction or Distortion of Competition within the Internal Market

It is now important to assess whether the break-even rule would have as its "object or effect the prevention, restriction or distortion of competition within the internal market".[120] First of all, as Lindholm affirmed, the elimination of competition in football is not a major concern in the sports industry.[121] This results from the obvious need for a competition, as well as the fact that richer clubs can certainly benefit from the existence of smaller clubs.[122]

Several case law has helped to conclude that salary caps most likely have an anti-competitive effect on the sports market in the EU. An anti-competitive object, on the other hand, should be reserved for cases which inherently present a very high degree of harm and impact on the market.[123] While the collusive behavior of clubs when adopting a salary cap might not have as its object to obtain a maximum profit, as it happens in several other cases of breaches of EU Competition Law, the truth is that, due to the very specific nature

[118] Commission Notice (1997), at Paragraph 9.
[119] Joined Cases T-259/02 to T-264/02 and T-271/02, *Lombard Club*, [2006] ECR II-5169.
[120] Article 101(1) TFEU.
[121] PARRISH (2003), at 118.
[122] For instance, player loans which allow developing young talents on extremely competitive environments.
[123] Opinion of Advocate General Wahl, Case C-67/13 P, *CB v. Commission*, Paragraphs 56-58.

of sports, their behavior will affect prices and subsequently the market, in what can considered to be price fixing. The interesting nuance in this regard, as we have previously assessed, is that salary caps can take different forms and produce different effects according to their intent and how they are introduced in a professional league. In this regard, as Advocate General Wahl stated, in a situation where not the object but the effects of the measure are being assessed, the intent by the undertakings involved should not be the main concern.[124]

One should conclude in this regard that the type of salary cap introduced will produce a unique effect which must be considered in a case-by-case assessment.[125] Nevertheless, and even if FFPR can avoid having an anti-competitive object, it will surely not be able to avoid having an anti-competitive effect. While there are different opinions on whether FFPR have an anticompetitive object, the truth is that, at least, these have an anticompetitive effect, mainly because they are successful in reducing overall salaries cost.

4.3.2.1.5. Appreciable Effect on Trade

Another crucial feature of Article 101(1) TFEU is that it requires that there is an appreciable effect on trade between Member States. Again, the CJEU has provided some guidance in this regard, as well as the Commission on its "Notice on the effect of trade concept"[126]. Considering the European football market structure and the role of FIFA and UEFA on the decision-making process for European competitions, it is without a question of doubt that the introduction of the break-even requirement in the European professional football affects trade between Member States, as clubs from multiple Member States compete in these leagues.

All the different types of salary caps have a strong cross-border effect on trade between Member States. As such, even in a scenario where a type of salary cap was to be adopted by a single national federation, that would still probably mean that there would be an appreciable effect on trade between Member States as any eventual player movement to that Member State would be restricted.

[124] *Ibid*., Paragraphs 106-109.
[125] LINDHOLM (2010), at 200.
[126] Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004 OJ C 101/07.

4.3.2.1.6. *De Minimis* Doctrine

Finally, for Article 101(1) TFEU to apply, it is mandatory that the agreement or decision by an undertaking/association of undertakings has an appreciable effect on the market. The *de minimis* doctrine has been developed by the CJEU (as it goes beyond the wording of Article 101(1) TFEU) and has been stated on the Commission's "Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union", presenting the following characteristics: "The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty: (a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors) ([2]); or (b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors)".[127]

Several case law has also supported this doctrine.[128] In this regard, when the undertakings/association of undertakings involved do not have a strong position in the market, that results in an insignificant effect on competition and thus any agreement or decision is considered to be out of the scope of Article 101 TFEU.[129] Regarding FFPR, it is without a doubt that UEFA has a large share in the relevant market and for that reason there is certainly an appreciable effect on competition and thus the *de minimis* doctrine is not applicable. As such, the introduction of the break-even rule necessarily has an appreciable effect on the market.

One should consequently conclude that FFPR appear to be under the scope of Article 101(1) TFEU.

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[127] Commission Communication Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014 OJ C 291/1, at Paragraph 8.
[128] For instance: Case C-5/69, *Völk v. Vervaecke*, [1969] ECR 295, at Paragraph 7; Case C-7/95 P, *Deere*, [1998] ECR I-3111, at Paragraph 77; Joined cases C-215/96 and C-216/96, *Bagnasco*, [1999] ECR I-00135, at Paragraph 34; Case C-238/05, *Asnef-Equifax*, [2006] ECR I-11125, at Paragraph 50.
[129] PARRISH (2003), at 113.

4.3.2.2. Article 102 TFEU

Regarding Article 102 TFEU, enacted to prevent the abuse of a dominant position, one could say that the typical structure for FIFA, UEFA, and football clubs could set the ground for a possible legal challenge for anti-competitive reasons. The main reason is that UEFA is the only entity in Europe allowed to enact regulations for professional football, such as the FFPR, or to provide rules and guidelines to the different national leagues. Nevertheless, scholars tend to agree that UEFA's behavior would hardly be considered as an abuse of a dominant position, mostly due to the importance that clubs have on the decision-making processes.[130]

Craig and de Búrca consider that there are two types of situations covered by Article 102 TFEU: "exploitative abuses" and "exclusionary abuses". While an "exploitative abuse" refers to a behavior which is harmful to consumers, an "exclusionary abuse" consists in a behavior which injures other competitors.[131] As the authors have also stated, the list of abusive practices under Article 102 TFEU is not extensive. Lindholm has stated in this regard that the FFPR do not fall under any of these categories nor fit the examples of abuses provided in Article 102 TFEU. The author states that salary caps (such as the break-even rule) "only injure players, not competitors or consumers, and they do not belong to the class of persons protected by Article 102 TFEU".[132] Also, in Advocate General Lenz's opinion in *Bosman*, players do not belong to the class of competitors, customers or consumers. Instead, he believes that "only the relationship between the clubs and their players is affected", in this regard.[133]

As such, it appears to be consensual among several scholars that the break-even rule, as well as other types of salary caps, should be excluded from the scope of Article 102 TFEU.

4.3.2.3. Are FFPR Mitigated by the Special Status of *Lex Sportiva*?

As we have assessed, FFPR appear to fall within the scope of Article 101(1) TFEU. However, it is still necessary to assess if there is a breach of EU law or if FFPR are instead mitigated by the special status of *lex sportiva*.

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[130] LINDHOLM (2010), at 201.
[131] CRAIG; DE BÚRCA, *EU Law: Text, cases, and materials*, 2015, at 1068.
[132] LINDHOLM (2010), at 201.
[133] Opinion of Advocate General Lenz, Case C-415/93, *Bosman*, at Paragraph 286.

In this regard, it is first important to look back at *Albany*[134], a labor law case in which the CJEU considered the application of Article 101 TFEU to collective agreements between organizations representing employers and workers. In that regard, the CJEU ruled that it was beyond question that certain restrictions of competition were "inherent in collective agreements between organizations representing employers and workers".[135] However, the social policy objectives pursued by such agreements would be seriously undermined if management and labor were subject to Article 101(1) TFEU "when seeking jointly to adopt measures to improve conditions of work employment".[136] As Weatherill stated, this decision has stood up to the idea that EU law is to be interpreted with "contextual nuance", which would help the case for sports entities.[137]

However, specifically in *Albany*, the key elements to the case related to collective actions and work conditions are missing from the FFPR, which means that UEFA cannot clearly apply *Albany*'s reasoning to sustain its position. Nevertheless, it could somehow be taken in consideration in a future legal assessment.

4.3.2.3.1 The Regulatory Ancillarity Doctrine

Wouters is extremely important to be taken in consideration by UEFA.[138] In *Wouters*, a landmark EU law case, the CJEU ruled that not every agreement restricting the freedom of action of the parties would necessarily be in breach of Article 101(1) TFEU, as the objectives of the assessed measure have to be taken in consideration. As Weatherill stated, the case concerned "rules prohibiting multi-disciplinary partnerships between members of the Bar and accountants".[139] In its ruling, the CJEU developed the "regulatory ancillarity" doctrine, under which certain measures and objectives would benefit from an exemption to the strict rule of Article 101(1) TFEU, if they were to pass a three-tier test of "necessity", "reasonability" and "proportionality". Under the "regulatory ancillarity" doctrine, even when there is a breach of the express wording of Article 101(1) TFEU, an exemption could occur when it is reasonable to conclude that "despite the effects restrictive of competition that are inherent in it", the measures are "necessary".[140] In *Meca-Medina*, a sports law dispute related to anti-doping rules, the CJEU applied the *Wouters* method to a sporting

[134] Case C-67/96, *Albany* [1999] ECR I-5751.
[135] *Ibid.*, at Paragraph 59.
[136] *Ibid.*
[137] WEATHERILL, Stefan, «Financial Fair Play and the law Part III: Guest post by Professor Stephen Weatherill: The legally ambiguous status of 'Financial Fair Play'», 2013.
[138] Case C-309/99, *Wouters*, [2002] ECR I-1577.
[139] *Ibid*.
[140] Case C-309/99, *Wouters* at Paragraph 110.

context and determined that for the purposes of application of Article 101(1) TFEU to a particular case, one should consider the objectives of the decision ("necessity"). Then, one should consider "whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives […] and are proportionate to them" ("reasonability" and "proportionality").[141] Only after applying this test, should one conclude if there is a breach of Article 101(1) TFEU.

In *Meca-Medina's* ruling, the CJEU concluded that the core objective of anti-doping rules was for competitive sports to be conducted fairly and ethically and that any sanctions that would affect "athletes' freedom of action" were contextualized to the anti-doping rules itself.[142] When applying the *Wouters* test, the CJEU found that the sporting rule in *Meca-Medina* did not breach EU law.[143] As such, just as Weatherill concluded, what was at stake was a restriction of competition compatible with EU law as it was justified by a legitimate purpose, inherent to the competitive nature of sports. In that scenario, only if the rules went beyond the necessary would an incompatibility with EU law prevail.[144]

Regarding FFPR, Serby believes that these restrict competition and lack proportionality, although they have not yet been sanctioned by the EU institutions.[145] In this regard, is still to be ruled whether FFPR are in breach of Article 101(1) TFEU or if they qualify for an exception.

4.3.2.3.2. Article 101(3) TFEU

The exemptions stipulated in Article 101(3) TFEU should also be taken in consideration. Under Article 101(3) TFEU, the provisions of Article 101(1) TFEU may be "declared inapplicable" when a measure contributes to improve "technical or economic progress, while allowing consumers a fair share of the resulting benefit", to the extent that it does not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives" and it does not "afford such understandings the possibility of eliminating competition in respect of a substantial part of the products in question".

While it seems unlikely that UEFA can prove that the current FFPR improve economic progress by allowing consumers a fair share of the benefit, as it is not considered

[141] Case C-519/04 P, *Meca-Medina*, at Paragraph 42.
[142] *Ibid.*, at Paragraph 44.
[143] *Ibid.*, at Paragraphs 45 and 47.
[144] WEATHERILL (2013).
[145] SERBY (2016), at 37.

a core objective of FFPR, one should not discard this argument for a future challenge in court. Anyhow, Weatherill doubts that Article 101(3) could apply as an exception for the break-even rule.[146]

Nevertheless, in the unlikely scenario that Article 101(3) TFEU was to qualify as an applicable exception for FFPR, that wouldn't preclude these rules from still being under the scope of the free movement of workers' rules, as it is further assessed.

4.3.3. FFPR and the Free Movement of Workers

Some critics also suggest (although not as strongly as with the breach of EU Competition Law) that FFPR could infringe the EU's fundamental freedoms, namely the free movement of people (players)[147], services (players' agents)[148] and capital.[149] The focus of this section shall be the free movement of players, as it is the legal issue most scholars tend to raise.

The *rationale* in this regard is generally simple to comprehend: the break-even rule, as a soft salary cap, will decrease the possibility of clubs to acquire new players as they will be strangled by the need to financially break-even. This will consequently and necessarily hinder the free movement of players throughout EU professional football leagues, when compared to the previous *status quo*.

It is important to state that, in the US, *Mackey* has shown that hindering the free movement of players is part of the assessment of whether a breach of Antitrust Law has occurred.[150] In the EU, hindering the free movement of players is an independent legal analysis under Article 45 TFEU, different from an eventual EU Competition Law breach.

4.3.3.1. Definition of Worker According to EU Law

To establish whether FFPR infringe Article 45 TFEU, players should be considered as "workers" according to the EU's definition of the concept. As Craig and de Búrca have stated, although the term "worker" was left undefined in the Treaties, it has been shaped by

[146] WEATHERILL (2013).
[147] Article 45 TFEU.
[148] Article 63 TFEU.
[149] Article 56 TFEU.
[150] Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976).

the CJEU throughout times.[151] The CJEU itself has insisted that defining the concept of "worker" was a matter of EU law in order to avoid lack of consensus in this regard.[152]

In this regard, there are no doubts whatsoever that players are to be considered as workers. Several case law has supported this in different sports and non-sports law cases.[153] In summary, as Craig and de Búrca have assessed, "any person who pursues employment activities which are effective and genuine to the exclusion of activities on such a small scale as to be regarded as a 'purely marginal and ancillary' is to be treated as a worker. For an economic activity to qualify as employment under Article 45 rather than self-employment under Article 49 TFEU, there must be a relationship of subordination". As such, players are to be considered as workers under EU law.

4.3.3.2. Wholly Internal Issues of a Member State

As assessed in *Bosman*, it is important to remind that Article 45 TFEU does not apply to a wholly internal issue of a Member State.[154] However, for FFPR, it is not possible to isolate the rules for a single Member State and name it as "wholly internal matter" as the rules necessarily produce effect on the movement of players for the whole European market.

As such, FFP Regulations appear to fall under the scope of Article 45 TFEU.

4.3.3.3. Is There a Breach of Article 45 TFEU?

In *Bosman*, the CJEU stated that "provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the works concerned".[155] This means that even though FFPR do not directly discriminate on a basis of nationality, they constitute an obstacle to the free movement of players.

Lehtonen provides a good understanding in this regard.[156] In this case, the CJEU concluded that the Treaty precluded the application of sporting rules that prevented basketball players from moving from one club to another.[157] *Lehtonen* was also relevant,

[151] CRAIG; DE BÚRCA (2015), at 748.
[152] *Ibid.,* at 749.
[153] For instance, *Bosman* or *Walrave*.
[154] Case C-415/93, *Bosman*, at Paragraph 89.
[155] *Ibid.*, at Paragraph 96.
[156] Case C-176/96, *Lehtonen*, [2000] ECR I-2681.
[157] *Ibid.*, at Paragraph 60.

following *Walrave* and *Bosman*, as it clarified that the Treaty provisions on the free movement of workers applied not only to the action of public authorities, but as well as to any other rules regulating gainful employment and the provision of services in a collective manner.[158] It was therefore concluded that the rules hindered the free movement of players, just as FFPR similarly appear to have the same effect on European football competitions.[159] Thus, one should conclude that FFPR hinder the free movement of players.

4.3.3.4. Could FFPR Constitute an Exception to the Free Movement of Workers Rule?

The next question to be answered is whether there is a justification for the hindering of the free movement of players. Article 45 TFEU stipulates two exceptions to the free movement of workers rule.

The first exception consists of "limitations justified on grounds of justified public policy, public security or public health". None of these justifications apply to the break-even rule or any other type of salary cap.

The second exception is related to the notion of "general interest" developed in *Gebhard*.[160] In this case, the CJEU defined the conditions under which an exemption could be applied to Article 45 TFEU: any measure must be justified by imperative requirements in the general interest, must be applied in a non-discriminatory manner, must be suitable for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.[161] This is a very similar test to the one applied in regard to EU Competition Law, so as to assess the "general interest": any measures should again be "necessary", "reasonable" and "proportional" if they are to be considered an exception to the application of Article 45 TFEU.[162] In this regard, Mortelmans has concluded that there is a clear tendency for convergence between the provisions on free movement of workers and the competition rules.[163]

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[158] *Ibid.*, at Paragraph 35.
[159] *Ibid.*, at Paragraph 49.
[160] Case C-55/94, *Gebhard*, [1995] ECR I-4165.
[161] *Ibid.*, at Paragraph 39.
[162] Case C-309/99, *Wouters.*
[163] MORTELMANS, "Towards convergence in the application of the rules on free movement and competition?", 2001, at 647: "From the analysis of the case law on the basic prohibitions in the EC Treaty and the exceptions to these prohibitions it is apparent that there are clear tendencies towards convergence between the provisions on freedom of movement and the competition rules. In more general terms, both sets of provisions have the same objective, the realisation of the common or internal market".

Again, it is extremely doubtful that the break-even rule would qualify for an exception in this regard. Firstly, it is not consensual that FFPR are suitable to achieve UEFA's aim: they do not have the same legitimate purpose as mentioned in *Bosman*, as mentioned by the European Commission[164] and as upheld by the CJEU. Secondly, it is far from proven that the break-even rule is necessary to achieve UEFA's objectives of financial stability and competitive balance. For instance, the economic overinvestment theory, which UEFA considers in its assessment, hasn't been proven as actually affecting the sustainability of clubs.

Just as it occurs with the eventual breach of Article 101 TFEU, the CJEU is still to produce significant case law to clarify this issue. The solution adopted will depend on how the CJEU assesses the specificity of sports and if the CJEU considers that other measures could apply. Anyhow, Article 165 TFEU could be the savior for UEFA and its break-even rule on grounds of the specificity of sports. In *Bernard*, the CJEU has taken into consideration the specificity of sports regarding free movement.[165]

Considering the abovementioned, it seems unlikely that the break-even rule could be deemed as necessary.

4.3.4. How to Support the Legality of FFPR?

To support the legality of FFPR and the autonomy of sports governance, an argument that could be used is that UEFA's measures aim at achieving a better distribution of wealth within sports, and preventing financial irrationality and indiscipline, since clubs tend to spend money they do not own, which affects the integrity of sports – one of UEFA's core objectives, one should recall. As Weatherill stated, Article 165 TFEU, in which for the first time a provision regarding sports and its structures' competence was enacted, could support UEFA's claim that FFPR are promoting "fairness", even though a restriction on competition should nevertheless be acknowledged. However, it is also worth pointing that Weatherill believes that Article 165 is a mere reflection of the judicial practice.[166] As such, its effectiveness is dubious.

UEFA could also stand for the idea that some restrictions should be compatible with the Treaty, since they could be the best option to pursue legitimate goals. However, it is questionable that the CJEU will dramatically change its current decision-making reasoning

[164] Commission Staff Working Document (2007), at note 210.
[165] PARRISH [et al.], *The Lisbon Treaty and EU sports policy: study*, 2010, at 33-35.
[166] WEATHERILL (2013).

by giving a wider spectrum of autonomy for sports governing bodies. The CJEU has made it clear in several previous cases that EU law is applicable to sports governing bodies' business decisions.[167]

Nevertheless, it is possible that the CJEU slowly adapts to the specificities of sports and eventually applies the provision of Article 165 to exempt a sports entity's legally doubtful decision that affects the EU internal market. FFPR, due to its very specific characteristics and goals, presents itself as a fine candidate for an eventual innovative doctrine of specificity in sports to be applied by the CJEU.

4.3.5. FFPR and the European Commission's Position

The European Commission's position has been deemed as especially important due to its certain degree of autonomy in developing competition policies in the EU's sports field.

Over the last few years, the European Commission has seemingly been supportive of FFPR, as it is possible to assess by analyzing Barnier's position in representation of the Commission while answering to a Parliamentary Question in August 2010[168], by the joint statement of Almunia and Platini, in 2012[169] and by the "Arrangement for Cooperation", signed by UEFA and the Commission on February 2018[170], which, overall, praised FFPR. As Geoff Pearson correctly asserted "the football 'transfer system' has been the focus of both the CJEU and the European Commission on several occasions, but despite a number of threats and rulings of incompatibility the restrictions persist and in some cases have actually reduced free movement since EU intervention".[171]

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[167] One should consider cases such as *Bosman*, *Meca-Medina* or *Bernard* (Case C-325/08, *Bernard,* [2010].ECR I-2177), for instance.

[168] Parliamentary Question, E-4628/2010, Answer given by Mr Barnier on behalf of the Commission, OJ C 170 E, 10/06/2011: "The Commission considers that the rationale of UEFA's plan seems to be in accordance with one of the objectives of the EU's action in the field of sport, namely with the promotion of fairness in sporting competitions (Article 165 TFEU). The Commission also notes that any measure taken in this framework has to respect the EU's Internal Market and competition rules".

[169] Joint statement by Vice-President Joaquín Almunia and President Michel Platini, 21 March, 2012, Paragraph 7: "These objectives are also consistent with the aims and objectives of European Union policy in the field of State Aid".

[170] Commission Decision of 19.02.2018 Adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA), C (2018) 876 final.

[171] PEARSON, «Sporting justifications under EU free movement and competition law: the case of the football 'transfer system'», 2015, at 221-222.

4.3.6. Legal Challenges to the FFPR

4.3.6.1. The *Striani* Challenge

So far, there have been two significant strikes to the FFPR. The first significant strike to the FFPR occurred with the so-called *Striani* challenge.[172] In 2013, Daniel Striani, an Italian players' agent, lodged a complaint under the Commission alleging that the FFPR did not comply with EU law. The lawyer who represented Striani was Jean-Louis Dupont, who mainly gained his reputation after acting in *Bosman*. Striani sought Dupont's representation as he has repeatedly stated that he doubts FFPR's legality, in light of EU law.[173]

As Flanagan assessed, in his complaint, *Striani* has identified five anti-competitive effects of the break-even requirement (eventual breach of Articles 101 and 102 TFEU).[174] Firstly, according to *Striani*, FFPR restrict external investments. Secondly, it calcifies the hierarchy of the game, preventing smaller clubs to achieve high competitive levels – thus resulting in a fossilization of the market structure (top clubs are to maintain or increase their dominance). Thirdly, it depresses the transfer market, resulting in a reduction of the number of transfers and the transfer amounts. Fourthly, it negatively affects players' wages. Finally, as a consequence of a transfer market depression, it reduces the revenue for players' agents. Also, according to *Striani*, FFPR infringe the rules on the free movement of people[175], services[176] and capital.[177] To *Striani*, UEFA's objective of long-term financial stability of clubs does not justify the existence of these regulations. However, in 2014, the Commission's DG Competition rejected Striani's complaint, upholding FFPR.

This dispute was also ruled by the Belgian Court of First Instance, in 2013, and considered by several FFPR's critics as a victory. The reason was that the Brussels Court decided to refer the case to the CJEU, as well as to impose an interim measure that prevented UEFA from implementing the second phase of its FFPR – which involved a reduction on the allowed deficit for clubs – by invoking Article 31 of the Lugano

[172] Case C-299/15, Striani v. Union Européenne des Sociétés de Football Association (UEFA) and Union Royale Belge des Sociétés de Football – Association (URBSFA), ECLI:EU:C:2015:519.
[173] DUPONT, "Complaint of Mr. Daniel Striani against the "FFP" UEFA regulation", 21 May 2014.
[174] FLANAGAN, "The evolution of UEFA's Financial Fair Play Rules – Part 2: The Legal Challenges", 2017.
[175] Article 45 TFEU.
[176] Article 63 TFEU.
[177] Article 56 TFEU.

Convention.[178] This was clearly an easy way out by the Brussels Court, or even an "example of legal fiction", as called by Ben Van Rompuy, since the Court appears to be contradicting itself.[179] On one hand, it reasons its ruling on formal grounds. On the other hand, it grants provisional measures and refers the case to the CJEU, after considering itself to be incompetent to rule due to the lack of jurisdiction.

In its ruling, the CJEU rejected the referral by considering it inadmissible because the necessary information to address the legal issues at stake had not been provided and therefore it was unable to rule on the substantive matters.

4.3.6.2. *Galatasaray v. UEFA*

A second challenge to the legality of FFPR was initiated by Galatasaray S.K. ("Galatasaray"), in the landmark case *Galatasaray v. UEFA*.[180] Quite unsurprisingly, Galatasaray chose Dupont to represent them, as the case was again on a possible breach of competition law and/or on EU's fundamental freedoms.

On a decision from the 2nd of March 2016, the CFCB's Adjudicatory Chamber concluded that Galatasaray S.K. had failed to comply with the terms of the previously settled agreement and decided to impose on the club "an exclusion from participating in the next UEFA club competition for which it would otherwise qualify in the next two (2) seasons (i.e. the 2016/2017 and 2017/2018 seasons)", as well as it ordered the club "to limit the overall aggregate cost of the employee benefits expenses of all of its players in each of the next two reporting periods to a maximum of sixty-five million Euros (€65,000,000)".[181] This was considered to be an aggressive enforcement of the FFPR, to which Galatasaray reacted by appealing to the CAS, arguing that the sanctions were illegal as the rules on which they were based (FFPR) were as well illegal. The arguments used by both sides were basically the same used in the past: the issue at stake was whether there was a breach of competition law and/or a breach of the right to the free movement of workers.

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[178] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, done at Lugano 30.10.2007, OJ L 339, 21.12.2007, p. 3: "Application may be made to the courts of a State bound by this Convention for such provisional, including protective, measures as may be available under the law of that State, even if, under this Convention, the courts of another State bound by this Convention have jurisdiction as to the substance of the matter".

[179] VAN ROMPUY, "The Brussels Court judgment on Financial Fair Play: a futile attempt to pull off a Bosman", 2015.

[180] Arbitration CAS 2016/A/4492 *Galatasaray v. UEFA*.

[181] UEFA CFCB, Adjudicatory Chamber, Decision in case AC-01/2016 *Galatasaray Sportif Sinai vs Ticari Yatirimlar A.S.*

In its ruling, the CAS panel upheld the CFCB's decision: a major victory for UEFA and its FFPR was achieved. Nevertheless, it is important to remember that both the *Striani challenge* and *Galatasaray v. UEFA* demonstrate that the basic legal grounds for future challenges on FFPR have been set (both on procedural and substantive grounds) and UEFA itself has acknowledged it by providing a more flexible approach to the rules in the recent years – to avoid possible upcoming legal challenges.

In the future, a different approach may be required and a hard salary cap could eventually be a part of that approach as a more proportional alternative.

5. HARD SALARY CAP AND THE COMPATIBILITY WITH EUROPEAN LAW

It is important to be clear when providing a legal analysis of the eventual introduction of any type of salary cap in European football, considering EU law: it isn't possible to provide any legal certainty on whether a salary cap would be deemed legal or in breach of EU law. The main reason is that the EU institutions - in this regard, necessarily the CJEU - have not pronounced themselves on the most relevant substantive issues which will help to define the path for the EU's sports policy.

While legal certainty is not possible to provide at this stage, one can assess whether it would be likely that the CJEU was to deem hard salary caps as legal, at least when compared to the currently existing FFPR. That is the proposed assessment in this chapter.

5.1. What Would a Hard Salary Cap Add to the Current FFPR?

As Parrish has stated, salary caps are by their own definition restrictive and depending on the form they take they restrict the amount clubs spend on wages and thus the supply and demand for players.[182]

On one hand, introducing a hard salary cap could certainly still contribute to improve the economy of professional clubs and prevent the increase of debt for European clubs, just as the current break-even requirement does. On the other hand, a hard salary cap would certainly be more effective in improving competitive balance in the European professional football leagues than the current break-even rule.[183] This is the reasoning usually adopted in the US to justify the existence of salary caps: both upholding financial stability in professional leagues and limiting clubs' wage costs, yet promoting competitive balance.

[182] PARRISH (2003), at 156.
[183] LINDHOLM (2010), at 196.

Nevertheless, as previously assessed, one should not categorize the typical US salary caps as hard, but instead as soft, due to the several exceptions applicable in the different leagues. It is therefore controversial that salaries caps, as they stand in the US, do improve competitive balance.

As assessed, the break-even rule produces the effects of a soft type of salary cap. To sustain FFPR's legality in future legal challenges, an analysis of possible alternatives to prevent overinvestment by clubs must be pursued. As Serby stated, the hard salary cap is an obvious alternative to the soft salary cap of the break-even rule.[184] Hard salary caps contribute directly both for clubs to maintain solvency and for competitive balance within leagues.[185] A hard salary cap would limit the wages paid to athletes by a club, independently of the club's financial balance, with no exceptions applicable.

Both maintaining financial stability for clubs and promoting competitive balance have been deemed as crucial features for the application of an eventual exemption to EU law. In a 2010 study requested by the European Parliament's Committee on Culture and Education, several acknowledged sports law scholars have discussed the eventual introduction of a hard salary cap.[186] These scholars have concluded that a hard cap "whilst imposing a much greater restriction on commercial freedom than a soft cap, is more likely to find favor in EU competition law".[187] They justify this statement by considering that "a soft cap may be insufficient to correct competitive imbalance as it disproportionately affects the ability of small clubs to improve their position".[188]

Nicolas Petit has classified the existing relationship between elite European football clubs, in light of FFPR, as a cartel and an "oligopoleague" between the richest clubs within UEFA competitions.[189] As such, bigger clubs are still able to invest more than smaller clubs, thus maintaining or even likely increasing the financial and competitive disparities.[190] A hard salary cap would create a flat ceiling on the amounts of money spent by clubs, therefore contributing to a fairer distribution of revenues between clubs, improving financial results and competitive balance both for clubs and professional

[184] SERBY (2016), at 45.
[185] *Ibid*.
[186] PARRISH [et al.] (2010), at 34.
[187] *Ibid*.
[188] *Ibid*.
[189] PETIT, Nicolas, «"Financial Fair Play" or "oligopoleague" of football clubs?: A preliminary review under European Union Competition Law», 2014, at 2.
[190] *Ibid*.

leagues. Serby considers the hard salary cap to be a valid alternative to the current break-even rule, promoting a fairer competition.[191]

It therefore seems likely that introducing a hard salary cap would be an effective replacement to the current break-even rule so as to pursue UEFA's legitimate objectives.

5.2. A Bipartite EU Law Issue

A question to be answered is whether a hard salary cap would be deemed legal by EU law. In its White Paper on Sport, the European Commission considered that the legality of the use of a salary cap model has yet to be determined, as courts have not yet ruled on substantive grounds in this regard.[192] That position remains intact as of today. Nevertheless, in fact, salary caps have been legitimized by some European countries. In France, for instance, Article L.131-16 of the French Sports Code expressly permits the use of salary caps (introduced by Law no. 2012-158, dated 1st of February 2012).

The answer to whether a hard salary cap would be deemed legal by EU law must pursue the same line of reasoning previously assessed in this work for the break-even rule: both a competition law analysis and a free movement of workers' analysis is required.

In this regard, as stated by Parrish et al., "a cap is inherently collusive".[193] As such, a hard salary cap will necessarily be restrictive for the market. For that reason, just as it occurs with the break-even rule, the same line of reasoning will lead to the conclusion that a hard salary cap is both under the scope of Articles 45 and 101(1) TFEU.

The question to be answered is how would a hard salary cap react when faced with the three-tier assessment of "necessity", "reasonability" and "proportionality". Following the CJEU's case law, a strong case could be made for a hard salary cap to be considered inherent in ensuring the economic viability of clubs competing in a league, while preserving and fostering competitive balance, as well as promoting the development of young players at the same time. In such a scenario, it would more like qualify for an exception under EU law when compared to the break-even rule.

Nevertheless, in light of EU law, it seems clear that no legal certainty regarding salary caps can be provided at this point. One should bear in mind that both the break-even

[191] SERBY (2016), at 47.
[192] Commission of the European Communities, White Paper on Sport, COM(2007) 391 final (July 2007).
[193] PARRISH [et al.] (2010), at 34.

rule, as a soft type of salary cap, as well a hard salary cap, are possibly in breach of EU law.

In an interesting study from 2014, Grégory Basnier analyzed the benefits of introducing a hard salary cap in the New Zealand professional rugby league.[194] The Commerce Commission, New Zealand's Competition Authority, concluded that the benefits of introducing a hard salary cap exceeded the negative anti-competitive effects and that a hard salary cap would promote competitive balance. As Basnier assessed regarding the substantive rules on competition, "the structure of the provisions applicable in New Zealand regarding anticompetitive agreements is similar to that of article 101 TFEU (prohibition principle/possibility of exemption)".[195] However, the author also notes that the decisions involved should be assessed under the specific background of New Zealand's Law and that several core differences between the legal systems prevail. Nevertheless, this study could somehow be taken in consideration by the EU institutions and UEFA to illustrate the potential of successfully introducing a hard salary cap.

Both hard and soft salary caps restrict competition and the free movement of workers. In this regard, the more exceptions a salary cap has – the softer it is -, the harder it will be to support its legality. Lindholm has stated that a hard salary cap will more easily be conceivable in a legal assessment than a soft salary cap.[196] A soft salary cap is surely not necessary to improve competitive balance, as the richer clubs are still able to acquire the rights for the best players (richer clubs can still afford to spend a large amount of their revenues in players' salaries) and consequently present the best sportive outcomes. As such, it is highly doubtful that competitive balance is achieved through a soft salary cap, such as the current break-even rule. For instance, regarding the G14 (organization of 14 (18 since 2002) leading European Football Clubs from 2000 to 2008) failed proposal to implement a soft salary cap, Stefan Kesenne has proven through an economic assessment that the proposed salary cap would have a negative impact and worsen competitive balance for most European professional football leagues.[197]

For that reason, a hard salary cap could more easily be justified under EU law and pass the three-tier test of "necessity", "reasonability" and "proportionality", grounded on

[194] BASNIER, "Sports and competition law: the case of the salary cap in New Zealand rugby union", 2014, at 155.
[195] BASNIER (2014), at 163.
[196] LINDHOLM (2010), at 211.
[197] KESENNE (2003), at 127.

the doctrine of the specificity of sports, as it is more effective in pursuing the underlying UEFA's legitimate objectives, by preventing overspending and by forcing clubs to be more selective when acquiring players and spending their revenues. [198]

In the end, I believe that the answer is economic-based. However, Article 165 TFEU will certainly have a special importance in the outcome of an eventual CJEU's ruling on substantive grounds which will mark a path for the EU sports policy.

5.3. *Lex Sportiva* Prevailing over EU Law: a Matter of Exemptions for Salary Caps

In *Bosman*, the CJEU acknowledged the *sui generis* characteristics of sports and that both competitive balance and financial stability were legitimate aims to pursue.[199] As assessed, FFPR do not currently improve competitive balance. However, it is far from certain that the CJEU would not recognize the benefits of the break-even rule in an innovative doctrine. Weatherill believes that it has not been demonstrated that other measures would be as effective as the FFPR in introducing more rationality in clubs' finances.[200] Also, the CJEU is likely to agree or at least highly take in consideration the Commission's position regarding the sports policy for the EU. In this regard, Parrish concluded that the Commission has widely supported FFPR.[201]

Nevertheless, as concluded, a legitimate aim is not sufficient to justify the legality of a salary cap. The measure at stake still needs to be deemed as "necessary", "reasonable" and "proportional". As such, the major question for an exemption to apply to a soft or a hard salary cap is how far would the CJEU be willing to take the special status of *lex sportiva*, when facing EU law. I believe that in this assessment relies a major part of the future for the EU sports policy. In this regard, Weatherill considers that UEFA's best approach would be to invoke the special status of *lex sportiva* and the expertise of sports governing bodies, while still not denying the application of EU law.[202] Serby considers unlikely that UEFA will be able to sustain its position on the current FFPR when facing a future legal challenge on a court that rules on substantive grounds.[203]

In the EU, it could be worth taking a deep insight at the legal effects of a CBA in sports. The CJEU has stated in *Albany* that it was beyond question that certain restrictions

[198] PARRISH [et al.] (2010), at 34.
[199] Case C-415/93, *Bosman*, at Paragraphs 105-106.
[200] WEATHERILL (2013).
[201] PARRISH (2003), at 156.
[202] *Ibid*.
[203] SERBY (2016), at 47.

of competition were inherent to collective agreements between organizations representing employers and workers. However, the social policy objectives pursued by such agreement would be seriously undermined if management and labor were subject to Article 101(1) TFEU when pursuing jointly measures to improve conditions of work and employment.

In *Bosman*, Advocate General Lenz stated that "it would be possible to determine by a collective wage agreement specified limits for the salaries to be paid to the players by the clubs".[204] Also, in *Brentjens*, the CJEU stated that collective labor agreements could be out of the scope of EU Competition Law if the social partners proved that the agreement improved employment and labor conditions for those covered by the agreement.[205] As such, Article 101(1) TFEU is not applicable to CBAs that have been agreed between workers and employers who intend to improve working conditions and the social policy in Europe.

Also, it should be concluded from *Albany* that the provisions set in a CBA are not automatically exempted from EU Competition Law. For an exemption to be applicable, the whole agreement must have a strong social intent in improving working conditions. Lindholm makes a relevant point when affirming that it "might be possible to shield" FFPR from a challenge on the basis of Article 101(1) TFEU by including the regulations on a CBA, as typically performed in the US. However, the author also acknowledges two reasons why this would be unlikely. Firstly, it would be necessary for clubs to concert their action in this regard, which is extremely improbable to occur. Secondly, even if an unlikely exemption was achieved under the scope of EU Competition Law, there would still be space for a challenge under Article 45 TFEU, for a possible restriction of the free movement of workers.[206]

As such, the CJEU's "regulatory ancillarity" doctrine, applied in a case-by-case assessment, appears to be the only possible reasoning for sustaining the legality of salary caps. Due to the current legal uncertainty, the CJEU's position in the future regarding the special status of *lex sportiva* could be the path for the introduction of a generally more conceivable measure, such as a hard salary cap.

[204] Case C-415/93, *Bosman*, at Paragraph 226.
[205] Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens*, [1999] ECR I-6025.
[206] LINDHOLM (2010), at 193.

6. PERSONAL REMARKS AND CONCLUSIONS

Salary caps can take several forms and exist in different sports structures. From an economic perspective, the positive impact of the break-even rule, usually deemed a soft type of salary cap, is questionable. Also, in light of EU law, it is without a question that the legality of the current break-even rule is very doubtful.

A few conclusions could be taken in this regard. Firstly, the financial impact that FFPR has on European clubs and competitions is seemingly enormous. The break-even rule forces clubs to be more rational when spending money, which necessarily affects players' salaries. FFPR have the effect of setting a limit between clubs' owners on what they pay to players. This is surely a negative consequence for players, as both the competition to acquire their rights and pay their wages are hindered.

Secondly, it has not been proven that FFPR have a positive impact on competitive balance, a legitimate goal for UEFA to pursue. In contrary, previously mentioned studies have shown that the current break-even rule increases the gap between the richer and the poorer clubs.

Thirdly, the applicable sanctions to clubs who breach FFPR raise questions regarding its efficiency. For instance, even though Paris Saint-Germain FC and Manchester City FC have been fined for their breach of the regulations, that hasn't prevented them from increasing their dominance in the European football competitions. As such, stricter sanctions should be applicable to clubs who don't comply with the regulations to deter their non-compliant behaviors.

From a legal perspective, I believe that the objectives proposed by the current FFPR do not justify its legality under EU law, considering the path that the CJEU has taken in the past. As Weatherill explained, football clubs do survive when they have high levels of debt, as there is always someone interested in them.[207] Instead, what could happen is that a club continues to exist under a different corporate form. Also, FFPR have a negative impact on competitive balance. Therefore, I agree that the current FFPR are not sufficiently well justified to be exempted from the scope of EU law, both from a financial perspective and a competitive balance perspective.

[207] One can consider the cases of Rangers F.C., S.S.D. Parma Calcio 1913 and Portsmouth F.C.

Another question to be answered is whether introducing a hard salary cap would be deemed as legal, in light of EU law, at least when compared to the current break-even rule. This thesis has provided two important answers in this regard.

Firstly, the US types of salary caps, usually conceptualized as hard salary caps, are in fact soft salary caps due to the various exemptions they foresee. While it is true that the different assessed salary caps could be considered "harder" than the current break-even rule, as a soft type of salary cap, the truth is that introducing a truly hard salary cap would be a unique experience for the European football structure, different from the US one.

Secondly, it has been concluded that a hard salary cap would more easily qualify for an exemption under EU law than a soft salary cap. The reason is that the hard salary cap would more likely survive the "necessity", "reasonability" and "proportionality" assessment. In this regard, it is undeniable that both soft and hard salary caps have a collusive effect on the market as they lower the cost price of players and their salaries. However, it is likely that the doctrine on the specificity of sports will more easily exempt hard salary caps from a breach of EU law. One could conclude that the benefits of introducing a hard salary cap, according to UEFA's objectives and the legitimate goals, tolerated in the past by the EU authorities, could outweigh the negative impact on the free market and so may well be justified under EU law.

The current FFPR raise serious concerns of compliance with EU law, and the outcome of a future CJEU's decision is difficult to predict due to the inconsistency presented in previous decisions.[208] At this stage, one can surely affirm that once again the special status of *lex sportiva* and the adjacent autonomy of UEFA in its role in sports governance are under challenge. If, and when, this matter reaches the CJEU, it will have to be ruled whether European football is special enough to admit arrangements such as salary caps, which restrict competition and hinder the free movement of players. An eventual decision by the CJEU will also be interesting to assess in light of Article 165 TFEU, which introduces the concepts of "fairness" and "openness". These concepts are seemingly vacuous and at the convenience of the CJEU for the interpretation that is found to be more suitable for the EU's interests.

Due to the unique structure of European football, it would be unexpected if clubs, FIFA and UEFA were to promote the introduction of a hard salary cap. Some authors have

[208] This inconsistency is present in the arguments for the decisions taken in a line of cases involving *Walrave*, *Meca-Medina*, and *Bosman.*

suggested that other alternatives could as well prove to be effective to pursue UEFA's goals and more likely comply with the requirements of EU law. For instance, Serby and Dupont believe that the simple measure of introducing a bank guarantee requirement to secure debt could prevent insolvency for clubs. When compared to the current break-even rule, such a measure would certainly not have such an impact on competition and on the free movement of players. As such, it would be a better candidate to qualify for an exemption under EU law than any type of salary cap.

To conclude, legal realists would surely agree that settling the ongoing legal issue will truly be a matter of policy. Will the CJEU be sympathetic towards the interests of sports governing bodies, bearing in consideration the special status of *lex sportiva*? Or, on the other hand, will the CJEU focus on a pure and strict application of the provisions and case law of EU law? Whatever attitude the CJEU adopts will unquestionably influence its decision. Personally, I suspect that the former question will be the most likely to occur, as the CJEU has provided a line of reasoning in the past that tends to acknowledge the special status of *lex sportiva*. However, due to the uncertainty in this regard, we will have to patiently wait either until the CJEU rules this issue on substantive grounds or until UEFA wisely adopts alternative measures to the break-even rule.

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