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ORIGINAL PAPER

The state of EU sports law: lessons from UEFA's 'Financial Fair Play' regulations

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Abstract The EU's sporting competence derives from the legal norm, established by the European Court of Justice, that requires that 'sporting rules' of sports governing bodies which have an economic impact and which breach the fundamental freedoms or competition law can only be justified if shown to be a proportionate response to an inherent need in the sport. However, the certainty of this norm is undermined by the EU's subsequent Treaty competence for sport, a political compromise, which is ambiguous, and which in due course generated the European Commission's sports policy, with its emphasis on governance and social dialogue. Consequently, EU sports law has evolved into 'soft law' which is far from coherent. This is demonstrated in the tolerance shown for certain of UEFA's 'sporting rules', notably its Financial Fair Play Regulations, which restrict competition and lack proportionality yet have not attracted sanction from the European Commission (a sports law policy which could be characterised as not even constituting soft law but delegalisation).

Keywords Financial fair play · Competition · EU soft sports law

1 Introduction

Since the EU institutions are restrained by the Treaty on the Functioning of the European Union ("TFEU") from stipulating a clear sports law, outside of very vague principles, the EU's sporting competence is limited and lacks concrete shape.[1] Weatherill encapsulates its amorphous nature when he refers to 'an EU sports law (of sorts).'[2]

An EU competence in sport first arose from decisions (considered below) of the Court of Justice of the European Union (CJEU), which established the legal norm that within the EU, professional sports, specifically the 'sporting rules'[3] of sports governing bodies (SGBs), are subject to the classic Treaty economic freedoms and competition law; albeit that, given the sport sector's specific characteristics, it would sometimes receive special treatment.

From the start, therefore, the precise shape of the EU's sporting competence was unclear, and as a result EU sports law has evolved as a result of negotiations between adverse interest groups.[4] During this process, in an example of the 'judicialisation' of the EU's political system, (whereby judicial law-making affects 'the strategic behaviour of non-judicial agents of governance'),[5] first a formal, but weak, treaty competence for sport was introduced in the Lisbon Treaty, and then the European Commission (EC), under the so-called Community method, instituted a sports policy, a form of soft law.

Although legal positivists doubt the existence of soft law, arguing that law is hard or not law at all; soft law is an

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[1] Weatherill (2011), p. 39.

[2] ibid, p. 38.

[3] The sporting rules which govern for example the number of players in a team, the size of the pitch and so on are uncontroversial; this article considers the sporting rules devised by SGBs that have an economic impact, such as rules on how players can be transferred between clubs, rules on the numbers of non 'home-grown' players a team may field, and rules restricting investment in clubs such as the FFP Regulations; for a discussion on 'sporting rules' see Garcia and Weatherill (2012), p. 238.

[4] Parrish (2012), p. 716.

[5] Stone Sweet (2010).

autonomous category of norms,[6] and an important constituent of EU law, and often accompanies the creation of a new EU competence. Terpan identifies a gap in the literature clearly identifying exactly what is meant by soft law, and how it is differentiated from hard law. He provides an overview of soft and hard norms in the EU which he categorises by reference to the strength of obligation and enforcement; there being a continuum between hard law at one end of the spectrum (with hard obligation and enforcement) through to a non-legal norm (no obligation or enforcement) at the other end. Furthermore he also considered that 'soft norms and coordination may provide a viable alternative to hard norms'.[7] In the case of the EU's sports competence, the EC's sports policy, or soft law, has modulated the legal norm created by the CJEU. What Terpan refers to as 'delegalisation' has occurred, the process whereby a legal norm is transformed into a non-legal norm, when both the obligation and enforcement elements have fallen into desuetude.[8]

This article considers the discrepancies between the EC's sports policy, and the legal norm created by the CJEU, and concludes that they are explained by the EC's importation of EU social law into its sports policy, specifically the requirement for social dialogue within sports governance. As a result SGBs have been granted excessive latitude by the EC in regard to compliance of their 'sporting rules' with competition law. Examples of this are the EC's endorsement of UEFA's 2001 Transfer Regulations,[9] its 'home-grown' players rule[10] and most recently the Financial Fair Play Regulations (FFP Regulations).[11] The article concludes with a review of the FFP Regulations, (which have been the subject of claims brought before both the EC and the CJEU, albeit the only substantive rulings to date have been of a procedural nature only as considered further in the Conclusion). Given that academic opinion (discussed below) is of the view that the FFP Regulations infringe EU competition law, the fact that the EC has supported them (albeit somewhat indirectly, as discussed below) is compelling evidence of the current incoherency of EU sports law resulting from the divergence of the EC sports policy from the CJEU sports law norm. Any ruling the CJEU may make on the FFP Regulations has been described by Weatherill as an acid test of the latitude to be given to SGBs and the extent of the deference the courts are willing to extend to sporting autonomy: 'what is at stake here is the intellectual and strategic heart of 'EU sports law'.[12]

2 What is 'EU Sports law'?

Pluralist theories of law accept that law is more than simply a manifestation of state control; and sports law,[13] an umbrella term describing a diverse set of rules and doctrines, has entered the legal lexicon.

The development of public sports law (including EU sports law) has been complicated by judicial reluctance[14] to intervene in the decisions of SGBs (which are for the main private bodies[15]) who have jealously guarded their legal autonomy,[16] and this has been exacerbated by the asymmetry between national legal systems and the global transnational SGBs. 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

[6] Terpan (2015), p. 74.

[7] ibid, p. 69.

[8] ibid, p. 68.

[9] For a discussion of these see Pearson (2015), p. 220.

[10] See Parrish et al. (2014), p. 493.

[11] See UEFA (2015a). For analysis of the FFP Regulations see Long (2012); Flanagan (2013); Lindholm (2010); Petit (2014); Vopel (2013); Serby (2014b); Bastianon (2015).

[12] Weatherill (2013); lawyer Jean-Louis Dupont, who acted for Bosman, brought a complaint to both the EC and the Brussels Court of First Instance on behalf of players' agent Striani stating that the 'break-even' rule generates the following restrictions of competition; restriction of investment; fossilisation of existing market structure; a reduction in the number of transfers; deflationary effect on players' wages and hence also agents' fees; see Dupont (2013). In June 2015 the Brussels Court of First Instance made a reference to the CJEU for a preliminary ruling on whether the FFP Regulations violate the EU fundamental freedoms of free competition (Arts 101 and 102 TFEU), free movement of capital and freedom to invest (Art 63 TFEU) and free movement of workers and free movement of services. The CJEU rejected the reference since the Brussels court had accepted it was incompetent itself to deal with the Striani case as it had no jurisdiction. Since the EC also rejected Striani's case in October 2014 on the basis that the Brussels court was handling his complaint, the case may return to the EC; see European Commission (2014a); see Van Rompuy (2015).

[13] Latty (2011). Latty refutes the 'Sports and the Law theory' that maintains there is no such thing as sports law, just sport and the law.

[14] The courts in the UK and elsewhere have taken their lead from Lord Denning's maxim in Enderby Town FC v the FA [1971] Ch 591, 605: 'Justice can often be done in them [domestic tribunals] better by a good layman than a bad lawyer'.

[15] This tends to be the case in legal systems with a common law heritage, whereas other legal systems, for example in France, provide that decisions of sports federations, (which have association status under private law), can be reviewed under the competence of an administrative judge.

[16] The Olympic movement led the way; Rule 25 of the 1949 Olympic Charter required autonomy for the National Olympic Committees and Rule 61 of the Charter states that 'IOC decisions are final. An athlete may submit his or her claim to the Court of Arbitration of Sport'.

international law.[17] Lex sportiva describes a form of transnational law,[18] in which disputes between clubs, athletes, federations and SGBs, which arise from the contractual nexus between these entities, (with the SGBs on the top of the sporting pyramid) are submitted to private arbitration, often with a right of appeal to the Court of Arbitration of Sport, based in Lausanne, Switzerland.

The emergence of an EU sports law, which as pointed out by Parrish[19] complements lex sportiva, has been coloured by the initial absence of any specific Treaty-based sports competence, and the incremental nature of litigation[20] and complaint handling. The origins of EU sports law can be traced to the 1974 *Walrave* case,[21] in which the CJEU held that there was no total exemption for sport in the application of the laws of the European treaties, but 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'.[22]

The ruling also clarified that the Treaty provisions prohibiting nationality discrimination in Articles 18, 45 and 56 carried horizontal direct effect, and that they could be invoked by a private party in a national court (in this case two athletes) against rules of a private regulator (such as a sports governing body) aimed at regulating in a collective manner gainful employment and the provision of services, and did not just constrain the actions of public bodies.[23]

Developing the *Walrave* ruling, and applying it in the context of football's transfer rules and nationality quotas in relation to fielding foreign players, the *Bosman*[24] decision in 1995 dealt a serious blow to the traditional legal autonomy of SGBs. Weatherill[25] notes that the decision represents a shift from the test laid down in *Walrave* because the CJEU did not assess whether the transfer regulations were a purely sporting rule (sporting rules in *Walrave* had been considered exempt) but held that, since they represented an obstacle to a fundamental freedom, they had to be 'justified'.[26] In the subsequent *Meca Medina*[27] case the CJEU clarified the position with regard to 'sporting rules' and said that: 'it is 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.'[28]

In *Meca Medina,* the CJEU applying for the first time what are now Articles 101 and 102,[29] rather than Treaty provisions on the free movement of persons or services, held that there is no blanket immunity from EU competition law for 'sporting rules', and that they need to be justified by a legitimate objective and be proportionate. Applying the *Wouters*[30] test the Court held that the sporting rule in *Meca Medina* did not breach EU competition law only because the court was satisfied that:

> such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes…in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport.[31]

The CJEU held that justification for the sporting rule did not necessitate an analysis of the exemption criteria provided for in Article 101(3) TFEU. As Parrish notes[32], this presents SGBs with a broader set of defences under competition law than provided for in the exemption criteria under the Article 101(3) TFEU economic efficiency tests.

As SGBs fought back in the aftermath of *Bosman* against what they perceived was the threat to their legal autonomy, a political consensus formed which led to

[17] For example the regulations published by the governing body of world football FIFA, the FIFA Statutes, Art 64(2)–(3) purport to prevent access to 'ordinary courts of law' to players. For a discussion of lex sportiva see Parrish (2012); Foster (2003).

[18] See Duval (2013) for a discussion of the meaning and legitimacy of transnational sports law, also Foster (2003).

[19] Parrish (2012).

[20] See Weatherill (2011), also Van den Bogaert and Vermeersch (2006), p. 821.

[21] Case 36/74 Walrave and Koch *v.* Union Cycliste Internationale [1974] ECR 1405. The claimants in *Walrave,* who had not been selected as pacemakers for the national cycling team on the ground that they were not nationals, brought a claim of unlawful discrimination under European law. They failed, since the court accepted that selection for national teams based on nationality was of 'purely sporting interest' and had nothing to do with economic activity (judgment para 8).

[22] ibid, para 4.

[23] ibid, paras 18 and 34.

[24] Case 415/93, Union Royale Belge des Societes de Football Association ASBL *v.* Jean-Marc Bosman [1995] ECR I-04921. UEFA's then transfer rules were held to infringe the right to free movement and non-discrimination, see Weatherill (2011).

[25] Weatherill (2003), p. 56.

[26] *Bosman* n 24 *supra,* para 21.

[27] Case C-519/04P Meca-Medina v Commission of the European Communities [2006] ECR I-6991. Two swimmers claimed that a ban based on a doping offence, upheld by CAS, infringed EU competition law, there being collusion between the governing body, CAS and the testers. For further analysis on *Meca-Medina* see Szyszczak (2007) 32(1).

[28] Meca-Medina n 27 *supra,* at para 27.

[29] Formerly Articles 81 and 82.

[30] Case 309/99 Wouters *v.* Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577.

[31] Meca-Medina, n 27 *supra* para 45 and 47.

[32] Parrish (2012), p. 722.

Treaty Declarations[33] and the Helsinki Report[34] (neither of which was legally binding instruments) which included references to the 'specificity of sport'.[35] Garcia and Weatherill describe 'specificity' as the 'next best' argument of SGBs after autonomy, 'autonomy is a claim to immunity. Specificity is a claim to have the law moulded in application to meet sport's special concerns.'[36] The EC's 2007 White Paper on Sport,[37] a significant EU sports policy document, was an attempt to summarise EU sports law, as contained in the rulings of the CJEU, and its practical effect on the ability of SGBs to govern their sports. The White Paper describes how the 'specificity' doctrine can be approached through two prisms: one relates to the specificity of sporting rules, for example separation between men and women, the need to ensure uncertainty of outcome and a preservation of competitive balance; and the other to the specificity of the structure of sport, for example the autonomy of sports organisations with their pyramid structure and solidarity mechanisms, and organisation along national grounds.[38]

The status of SGBs, and their access to political leaders, makes them a part of the elite pluralism[39] which characterises EU interest politics. An example of UEFA's ongoing political influence over EU sports policy making, is its presence (as an observer) at the meetings of the Expert Groups on sport, set up by the Council to inform EU sport policy making.[40] SGBs, in particular UEFA, assiduously lobby members of the European Parliament, which has come out in support of potentially anti-competitive sporting rules.[41]

European political leaders support for the right to sporting self-determination,[42] led in due course to a very limited formal competence for the EU in sport in a new Article 165 in the Lisbon Treaty: while taking account of the specific nature of sport[43] [Union action shall be aimed at] developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports[44] [the action should take the form of the European Parliament and the Council] adopting incentive measures, excluding any harmonisation of the laws and regulations of the Member States.[45] According to Articles 2(5) and 6 TFEU the only EU action legitimised is complementary, co-ordinating and supporting in nature, (the weakest of the three competences set out in Title I of Part One of the Treaty[46]).

Since the European Union operates on the principle of conferral, the Lisbon Treaty undoubtedly altered the relationship between sport and EU law, as now the direct involvement of the EU in sports policy was constitutional.[47] Rather than being a threat to the autonomy of SGBs however, the inclusion of a specific sporting competence in the Lisbon Treaty, with its weak legislative remit and reference to the 'specificity of sport' is an example of the 'strategy of empowering the EU in order to restrain it'[48].

Weatherill, while citing 'openness' and 'fairness' as candidate principles of a developing EU sports law post Lisbon, doubted whether the formal Treaty competence for sport acquired in 2009 would change the scope of the pre-existing EU sports law, in particular in relation to sports governance. He said that Article 165 'certainly does not allow the EU to usurp the proper place of sports organisations in selecting their preferred system of governance…'.[49]

Parrish, on the other hand, sees sports governance as within the EU sports competence: 'while EU sports law recognises 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.'[50]

[33] Treaty of Amsterdam 1997, Declaration 29; Treaty of Nice 2000, Annex IV. 'The Nice Declaration on Sport' as part of the Presidency Conclusions in December 2000. Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies, Nice European Council Meeting, December 2000.

[34] COM (1999) 664 Final 10/12/99.

[35] see for example the Treaty of Amsterdam (1997): 'The Conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue'.

[36] Garcia and Weatherill (2012), p. 18.

[37] European Commission (2007), at 4.1.

[38] ibid, at 4.1.

[39] Mazey and Richardson (2006), p. 247.

[40] See further discussion at Geeraert and Drieskens (2015).

[41] Garcia (2007), p. 215.

[42] Garcia and Weatherill (2012), in which they discuss the political agreement to curtail the competence of the EU in sport, which resulted in art 165.

[43] Art 165(1) TFEU.

[44] Art 165(2) TFEU.

[45] Art 165(4) TFEU.

[46] Art 6(e) TFEU.

[47] As a result of Case 106/96, United Kingdom v Commission of the European Communities [1998] E.C.R. I-2729 the Commission had been obliged to switch sports funding into education, an area of existing competence.

[48] See Garcia and Weatherill (2012), p. 18. This conclusion is reinforced by the doubts as to the extent of the horizontal reach of Art 165. By contrast TFEU Arts 8 (equality between men and women), 11 (environmental protection) and 12 (consumer protection) are clearly worded to require the EU institutions to respect these obligations when exercising other treaty competences.

[49] Weatherill (2011), p. 38.

[50] Parrish (2012), p. 716.

Parrish is correct in so much as he accurately reflects, as discussed below, the EC's own reading of its sporting competence. Weatherill is also right in that neither the sporting decisions of the CJEU, nor Article 165, justify this interpretation by the EC of the EU sporting competence. From this stems the current incoherence in EU sports law, which is reflected in the recent debate over the lawfulness of UEFA's FFP Regulations, deemed by academics as in breach of EU competition law.[51]

3 EU sports law as sports policy: the role of the European commission in the regulation of sport in the EU

Under Terpan's definition of EU legal norms,[52] and their position within the hard/soft law spectrum, law is hard where a very constraining form of non-judicial control is possible. The legal norm originating in the sporting decisions of the CJEU discussed above is soft, since non-judicial control of SGBs is undermined by the indeterminate nature of the doctrine of the 'specificity of sport'. There is no closed list of sporting rules that offend against EU law, and according to the CJEU in Meca-Medina:

> the compatibility of rules with the Community rules on competition cannot be assessed in the abstract […] account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives (Wouters and Others, paragraph 97) and are proportionate to them.[53]

Article 165 also undermines effective non-judicial enforcement, since sport is placed within the weakest of the EU competences, and so Article 165 'emphatically does not elevate the EU to the position of general 'sports regulator' in Europe.'[54]

Lacking any legislative jurisdiction under Article 165, the EC's sports policy is soft law arrived at through policy documents,[55] inspired by research,[56] and implemented in its steering of SGBs:

> Through its dialogue with sport stakeholders, the Commission will continue its efforts to explain, on a theme-per-theme basis, the relation between EU law and sporting rules in professional and amateur sport. As requested by Member States and the sport movement in the consultation, the Commission is committed to supporting an appropriate interpretation of the concept of the specific nature of sport and will continue to provide guidance in this regard. Regarding the application of EU competition law, the Commission will continue to apply the procedure as foreseen in Regulation (EC) No 1/2003.[57]

Steering is most effective under the 'shadow of hierarchy',[58] i.e. where it is backed up by the threat of sanctions, yet Weatherill[59] agrees with Pearson[60] that the EC has been generous with the latitude shown SGBs.

For example, the evidence from a 2013 study,[61] suggests that UEFA's 2001 Transfer Regulations (endorsed by the EC and a replacement of the version ruled unlawful by *Bosman)*, constrain smaller clubs from competing in the transfer market, and that their objective, namely to incentivise training and development of young players, is not met either. Pearson argues that a challenge to the 2001 Transfer Regulations under EU competition law would succeed under the *Wouters* criteria. The lack of ability of smaller clubs to compete in the market for the elite players could be judged to be contrary to the 'fairness and openness in sporting competitions' principle in Article 165.[62]

Another example of the EC's latitude towards UEFA's 'sporting rules' can be seen in its endorsement of the 'home-grown player rule' whose proclaimed object is to increase competitive balance and improve the training and development of young players. However Parrish et al. argue that it gives rise to indirect nationality discrimination.[63]

The EC is subject to a degree of control (from Member States, the Council and Parliament) and although it has some degree of autonomy in formulating competition policy in the sports field, it does not take decisions in a

[51] For example see the literature cited at n 11 *supra.*

[52] Terpan (2015).

[53] *Meca Medina* n 27 *supra,* para 42.

[54] Weatherill (2011), p. 38.

[55] For example the European Commission (2007) see n 37 *supra* and European Commission (2011) at n 57 *infra.*

[56] See for example KEA/CDES (2013).

[57] European Commission (2011) at 4.2 'The specific nature of sport'.

[58] Terpan (2015), p. 93.

[59] Weatherill (2014), p. 117.

[60] See Pearson (2015) for an analysis of the potential non-compliance with EU competition law of the transfer regulations; and Egger and Stix-Hackl (2002).

[61] KEA/CDES (2013).

[62] Pearson (2015), p. 237.

[63] Parrish et al (2014), p. 493. This was introduced at the start of the 2006/7 season and requires clubs entering UEFA competitions to name eight "home-grown" players in their 25-man squad.

political vacuum.[64] Geeraert and Drieskens see the latitude given by the EC to SGBs as '[the] politicisation of public enforcement of competition law' which has led to the 'generous treatment of sport and football cases'.[65]

In similar tone, Pearson describes the EU sports policy as 'a complex and ongoing political and economic exchange between the organisations, other stakeholders and public authorities'[66] which preserves the ability of SGBs to regulate their sports so far as possible without interference from EU law: 'Protecting integrity of competition, "competitive balance" and "training and development" of young players have been the main pillars against which sport's governing bodies have looked to support regulations, practices and traditions that are prima facie breaches of EU law.'[67]

Rather than focussing on fair competition, the cornerstone of the EC sport policy is the promotion of open and fair sports governance, which it seeks to promote through the Social Dialogue principles, under EU social law contained in Article 154 TFEU.[68] This is not a natural interpretation (vague though it is) of the Article 165 duty of 'developing the European dimension in sport, by promoting fairness and openness in sporting competitions.'

In its 2011 policy paper, 'Developing the European dimension in Sport'[69] (a follow-up to the 2007 White Paper on sport) the EC goes so far as to say that '[g]ood governance in sport is a condition for the autonomy and self-regulation of sport organisations.'[70] In this policy document the EC cites 'democracy, transparency and accountability in decision-making, and inclusiveness in the representation of interested stakeholders'[71] as the interlinked principles that should underpin sports governance at European level. The importance of governance in the EU sports policy is emphasized by the creation of an EU Expert Group on Good Governance which reported in 2013 that the EU 'can provide guidance for the good governance of sport at national, European and international level'[72] based on 'the rule of law which it has the task to promote'; 'the rule of law' is summarized in three principles: (i) the separation of powers, (ii) public procurement based on transparency and impartiality and (iii) the 'recognition of social dialogue and of the role of social partners in the fields of labour law and employment'.[73]

The social dialogue principle is the EC's answer to the question 'who rules?' posed by Gardiner and Welch, in the light of the perennial conflict between the right of sport to regulate itself, or be bound by rulings and decisions of the CJEU. Gardiner and Welch proposed as a solution to this problem a system of reflexive law based on dialogue between social partners.[74]

Weatherill summarised the judicially created sports law norm as autonomy for SGBs from EU law conditional on their 'sporting rules' responding proportionally to an inherent need in the sport where they have an economic impact.[75] The reason for the lack of coherence in EU sports law is the EC sports policy which appears to elevate above this principle the importance of social dialogue in sports governance. This is seen clearly in the EC's political support for UEFA's FFP Regulations. In October 2014 Commissioner Androulla Vassiliou, Member of the European Commission for Education, Culture, Multilingualism and Youth, strongly supported the FFP Regulations as a 'key tool to ensure transparency and to promote better governance standards within sport'.[76] To a certain extent the FFP Regulations are a manifestation of social dialogue in football, but on closer inspection, they reflect the commercial domination of the elite European football clubs over UEFA, and their effect, as described below, is to stifle fair competition.

4 The financial fair play regulations

The emphasis placed by the EC on 'good governance' spurred the creation by UEFA in 2008 of a Social Dialogue Committee for European Professional Football between the regulators (UEFA) and the regulated (the clubs, leagues and players). In due course, UEFA procured the

[64] Geeraert and Drieskens (2015), p. 14, for a discussion of the Parliament's role in formulation of sports policy, deriving partly from its control over EU budgets.

[65] ibid, p. 11.

[66] See Pearson (2015).

[67] ibid.

[68] The promotion of social dialogue in football by the EC led to an agreement on standardised player contracts. The Commission funded a number of projects exploring social dialogue between players and clubs which are listed at footnote 149, European Commission Staff Working Document (2007).

[69] see European Commission (2011) at 4.2 'The specific nature of sport'.

[70] *ibid,* at 4.1,10.

[71] *ibid,* at 4.1,10.

[72] 2011/C 162/01 (established on the basis of the Council Resolution on an EU Work Plan for Sport 2011-2014) Expert Group 'Good Governance' Deliverable 2 Principles of good governance in sport (2013) p. 5.

[73] *ibid,* p. 6.

[74] Gardiner and Welch (2007), p. 1.

[75] Weatherill (2011).

[76] See European Commission (2014c); see also European Commission (2012).

endorsement of its new Financial Fair Play rules from this new body. Endorsement by the players union FifPro[77] has the advantage of minimising a challenge to the FFP Regulations; any challenge would in the first instance have to be to the Court of Arbitration for Sport based in Switzerland.[78]

The background to the FFP Regulations was the growing evidence of debt[79] among top European football clubs. This led in 2009, to UEFA's Financial Control Panel amending its existing licensing regulations with the addition of a new 'break-even requirement', which is the core of the Financial Fair Play Regulations.[80] They provide that football clubs, as a condition for taking part in the most lucrative[81] sports competition globally (the UEFA Champions' League), face a new limit on the amount they can invest in their largest item of expenditure, namely purchasing, and paying the wages of, players. Under the 'break-even' rule, clubs can not spend more than their income derived from football activities, and equity investment from rich benefactors can not be counted as part of the club's income.[82]

The phenomenon of the rich investor[83] purchasing a football club had spawned a new vocabulary, e.g., a 'benefactor' as opposed to a 'self-sustaining' club and the concept of the 'sugar daddy'. Muller likens the 'sugar daddy' phenomenon and excessive funding in football clubs to medical doping, and argues that financial doping threatens sport's integrity and therefore potentially in the longer term, its popularity and viability.[84] Flanagan cites evidence of the huge inward 'sugar daddy' investment in the benefactor (or 'investor') clubs having a direct affect also on the wages paid at the 'self-sustaining' clubs.[85] In the words of Michel Platini[86] justifying the introduction of the 'break-even' rule: '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.'[87]

UEFA's stated objective for the FFP Regulations is to improve the 'economic and financial capability' of the top flight European football clubs thereby ensuring their future 'long-term viability'.[88] In UEFA's own words, the FFP Regulations were introduced with a view 'to decrease pressure on salaries and transfer fees and limit inflationary effect […] to encourage long-term investments in the youth sector and infrastructure'.[89] It is not surprising, therefore, that the amounts invested by clubs in players have been reduced, in comparison with what would be the case in an unregulated free market. Whether this is an object or an effect of the FFP Regulations is of course irrelevant from the point of view of Article 101 TFEU. Peeters and Szymanski in their 2012 study into the likely economic effects of the FFP Regulations concluded that wage to turnover ratios would fall by as much as 15 %.[90] UEFA's benchmark report 2013/14 suggests this was a conservative estimate as it records that for the first time in several years the growth in revenue outpaced wage increase, thereby contributing to an improvement of 36 % in aggregated net results reported by all top division clubs, from a record €1.7 billion in 2011 to €1.1 billion net loss, a similar level to 2009.[91] Deloitte[92] reports that the 2013/14 season's overall wages/revenue ratio fell to 59 % across the 'big five' leagues,[93] its lowest level since 1999/00.

The 'break-even' requirement of the FFP Regulations clearly restricts competition and has suppressed the wages of players through the introduction of a 'soft' salary cap,[94] and may thus be construed as anti-competitive in terms of

[77] see Parrish (2011) for a discussion of this committee. See https://fifpro.org/en/news/fifpro-demands-sanctions-in-financial-fair-play-concept for comments by FIFPro's General Secretary Theo van Seggelen welcoming FFP and calling for tougher sanctions on clubs in breach of the rules.

[78] UEFA's statutes at Article 61 give jurisdiction to CAS to arbitrate on disputes between UEFA and clubs, players and leagues and associations 'to the exclusion of any ordinary court'. Swiss club FC Sion's jurisdictional challenge led to threats from FIFA to expel Switzerland from international football; see further Flanagan (2013).

[79] see UEFA (2009).

[80] see n 11 *supra*.

[81] Deloitte (2015).

[82] Certain items of expenditure however are exempted from the 'break-even' calculation, for example, investment in stadia, training grounds, community development and youth academies; see arts 57–60 of the FFP Regulations; a deviation of €30 million in contributions from equity participants or related parties is permitted for the 2015/16 through to 2018/19 periods under art 61(2). For a fuller description of the FFP Regulations see Serby (2014b) and Bastianon (2015).

[83] For further discussion see Flanagan (2013); see Vopel (2013). The trailblazer was Roman Abramovich at FC Chelsea who invested approximately half a billion euros on the club in the first decade of the century, more recently at Manchester City FC Sheikh Mansour bin Al Nahyan who purchased the club in 2008 is reported to have invested over one billion pounds of his personal wealth in the club.

[84] Müller et al (2012), p. 117.

[85] Flanagan (2013), p. 162.

[86] From 2007 to 2015 UEFA's President (and very much personally associated with the introduction of the FFP Regulations, for whom it has been something of a crusade).

[87] UEFA (2008).

[88] Art 2.

[89] UEFA (2015b).

[90] See Peeters and Szymanski (2012).

[91] UEFA (2014).

[92] Deloitte (2015).

[93] England, Germany, Italy, Spain and France.

[94] For a discussion of hard as opposed to soft salary caps in place in individual sports both in Europe and elsewhere, see Lindholm (2010), p. 190.

Article 101(1) (a) TFEU which prohibits direct or indirect fixing of purchasing or selling prices. Weatherill is in no doubt that the break-even requirement is in effect:

> a horizontal agreement between suppliers (of sports services: clubs) which includes commitments to restrain spending (inter alia on players' wages). It is also strengthened by vertical restraints (licensing requirements) enforced by UEFA, the governing body. It is a restriction on competition (to acquire players' services) which has the effect (inter alia) of depressing the levels of remuneration payable to players.[95]

Article 101(1)(b) TFEU prohibits agreements or decisions that limit investment. The EC has previously held an agreement between two rival breweries to jointly halt investments in downstream capacities to be a hard core infringement.[96] The CJEU held a 'crisis cartel' that aimed to cut overinvestment a restriction of competition by object contrary to Article 101(1)(b) TFEU.[97] As Petit, who coined the term 'oligopoleague' to describe the cartel of elite European football clubs created by the FFP Regulations, puts it: 'in real life markets, debt is a conventional strategy to finance productive investments, and a driver of market competition'.[98]

Another anti-competitive effect of the soft salary cap contained in the 'break-even' requirement is that it has had as expected a negative impact on the competitive balance within football leagues.[99] As a result of the 'break-even' rule a cartel of elite clubs is in a permanently privileged position in the upstream input market for purchase of players. This triggers privilege also in the downstream secondary markets such as media rights, merchandising, tickets and sponsorship. There is considerable evidence of the fact that 'a club's material success on the pitch is broadly predicated on their gross spend on players' wages'.[100] Vopel's study for example supports the contention that the break-even requirement 'unintentionally protects well-established clubs from being challenged by non-established clubs'[101] and can be considered as a barrier to entry for smaller clubs. The restriction on investment implements 'collusion' that results in rent shifting.[102]

The beneficiaries of the cartel, are the elite clubs, brought together in the European Club Association (ECA).[103] Although UEFA consulted with national associations and leagues (many of whom have their own domestic version of financial fair play rules[104]), the greatest leverage, in relation to the introduction and scope of the new 'break-even' rule came from the group whom the rules most benefit, which is not surprising given their economic muscle. In 1998 the elite clubs, broadly speaking those clubs now in the ECA, threatened a breakaway from UEFA with a proposed European Super League competition.[105] Under Article 102 TFEU UEFA would be unable to prevent clubs or players joining such 'unofficial' competitions.[106] The EC's sport policy might have to be rethought if elite clubs broke away from UEFA, as a key part of the 'European model of sport' is the football pyramid and the links between the grass roots and the elite echelons of professional sport, this being one of sport's key specificities, which earns it special treatment under EU sports policy.[107] The breakaway was prevented by UEFA's change of format of the Champions League, which together with the 'break-even' rule protects the financial dominance of the elite clubs. Geeraert and Drieskens have compared the relationship between European elite football clubs and UEFA to the principal (clubs)/agent (UEFA) relationship.[108]

The suspicion that the 'break-even' rule is largely a negotiated agreement between UEFA and the elite clubs whom it benefits is reinforced both by the manner in which it is enforced (the amount of sanctions being a matter for private negotiation[109] between individual clubs and UEFA) and by the willingness of UEFA to amend the rules under pressure from the ECA.[110]

[95] Weatherill (2013).

[96] See Decision of the Commission of 29 September 2004, COMP/C.37750/B2—Brasseries Kronenbourg, Brasseries Heineken, OJ L 184 of 15 July 2005, p. 57.

[97] Case C- 209/07, Competition Authority v Beef Industry Development Society Ltd et Barry Brothers Meat Lt., [2008], ECR I-08637.

[98] Petit (2014).

[99] Long (2012), p. 93.

[100] Flanagan (2013), p. 160.

[101] Vopel (2011).

[102] ibid, p. 54.

[103] this represents 214 European football clubs from 53 associations and has endorsed the Regulations, see http://www.ecaeurope.com/news/eca-statement-on-financial-fair-play/.

[104] across the top European national leagues there are a variety of different versions of the 'financial fair play' principle in place; see further Geey (2012).

[105] Pijetlovic (2015) and The Independent (1998).

[106] Case C-49/07, *MOTOE v. Ellinko Dimosio* [2008] ECR I-4863.

[107] See European Commission (2007).

[108] Geeraert and Drieskens (2015). Extending their analysis of EU football governance in terms of the Principal/agent relationship, Geeraert and Drieskens describe the CJEU and Commission as both agent (of the member states) and principal (of UEFA) who use control instruments to push UEFA into compliance.

[109] See van Maren (2015) in which the author discusses the first disciplinary sanction under the FFP Regulations where details have been made public, in June 2015.

[110] In June 2015, in response to the reference to the CJEU for a preliminary ruling, see n 12 *supra*, UEFA announced the 'break-even' rule would be slightly relaxed. UEFA justified the amendments to the FFP Regulations with reference to consultation with the ECA: 'These

5 Competition law in the sports sector: are the FFP regulations a proportionate response to a problem inherent in professional football?

Advocate General Lenz's Opinion in *Bosman*[111] contained an analysis of competition law as applied to European sport which remains relevant today, and which prefigured the ruling in *Meca Medina.*[112] He said that: 'the field of professional football is substantially different from other markets in that the clubs are mutually dependent on each other'[113] and therefore it was possible 'that certain restrictions may be necessary to ensure the proper functioning of the sector' so that 'restrictions of competition which are indispensable for attaining the legitimate objectives pursued by them do not fall within Article 85(1)'.[114]

Although sports teams compete with one another to win competitions, unlike in other sectors of the economy, clubs need their competitors to survive, in order that overall the competition retains integrity. Vopel refers to this interdependence in terms of the economic theory of 'associative competition' between sports teams operating within a league.[115] Out of this associative competition arises a conflict of interest between the interest of individual clubs and the interest of the league as a whole. This conflict needs to be regulated exogenously, and in the case of European football by UEFA. UEFA's FFP Regulations, as a measure to cure overinvestment (which potentially threatens a club's very survival)[116] in club football, must be seen in this context.

The EC has not wavered from its support for the 'break-even' requirement, as evidenced for example by the joint statement issued by the EC and UEFA on 21 March 2012: 'the 'break even' rule reflects a sound economic principle that will encourage greater rationality and discipline in club finances and, in so doing, help to protect the wider interests of football […] preserving fair competition between football clubs.'[117]

The EC has rejected a complaint that the FFP Regulations infringed Articles 101 and 102 TFEU; the rejection was on the basis that the complaint was concurrently pending before a national court in Belgium, but subsequently the CJEU has questioned the jurisdiction of that court.[118] So the FFP Regulations may well return for consideration either by the CJEU or EC.

The first hurdle the FFP Regulations must overcome, to pass the *Wouters* test, and demonstrate they are proportionate and the least anti-competitive response to any threat to professional football's viability posed by overinvestment and debt, is to demonstrate that the licensing requirements in place prior to the FFP Regulations were inadequate. These required, and still do, clubs to prove at the start of the season that no debts were due to other clubs, players or the tax authorities.

Assuming this hurdle was overcome, UEFA would then need to show there were no other solutions (to overinvestment) less restrictive of competition. There is an obvious alternative to the soft salary cap of the 'break-even' rule: the 'hard' salary cap. Hard salary caps have a significantly less detrimental effect on competition than the 'break-even' rule, and are very common. Indeed 'in most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed among themselves'.[119]

Where hard salary caps operate all the clubs comprising a league or federation agree to limit equally the amount of spending on the wages paid to the athlete employees, irrespective of the financial standing and income of a club. Such caps[120] therefore contribute directly both to maintaining solvency and competitive balance within the league. Although the EC in its White paper on Sport acknowledged that the legality of salary caps had yet to be determined,[121] salary caps have not been challenged in the courts to date, and Article L.131-16[122] of the French sports code has clearly legitimised them.

Historically such rules were more a feature of professional sport outside Europe. In North America they have been in use in the NBA (basketball) and American football (NFL) since 1982 and 1993, respectively,[123] and they are also a feature of Australian professional sport (including

Footnote 110 continued
updated regulations come after a two-year collaborative and consultative process involving key stakeholders including the European Club Association (ECA) via a dedicated UEFA-ECA Working Group.' http://www.uefa.org UEFA may be moving towards the type of regulatory control found in the English Football Association's version of the financial fair play rules, namely tolerance for a higher level of indebtedness (£105 million over 3 years) backed by a bank guarantee, see n 128 *infra.*

111 See n 24 *supra*.

112 See n 27 *supra*.

113 *Bosman,* n 24 *supra* para 270.

114 ibid.

115 Vopel (2011), p. 56.

116 Long (2012), 75 for a discussion of the case of Glasgow Rangers FC.

117 European Commission (2014c).

118 See n 12 *supra*.

119 Ross (2004), p. 49.

120 i.e. a cap on the amount that clubs may pay on salaries for players applied equally to teams within a league.

121 European Commission (2007) (Accompanying document to the White Paper on Sport, July 11 2007), p.76.

122 Introduced by law no. 2012-158 dated 1st February 2012.

123 Weiler and Roberts (2004), p. 240.

the Australian Football League, NRL, and the A-league).[124] Recently hard salary caps have entered into European sport, through rugby, firstly Rugby League, then Rugby Union, in 1997 and 1999 respectively.[125] The England and Wales Cricket Board has introduced salary caps into professional English cricket[126]; while the FA Premier League (FAPL) in 2013 introduced a wage cap[127] which restricts to £4 million the extra money received from the league's greatly increased television revenues[128] which could be spent on players' wages for the 2013–2014 season. 'Hard' salary caps, unlike the blunt 'break-even' rule, lessen the prospect of a cartel, since they equalise the expenditure clubs can make on players' salaries.

A study on the introduction of salary caps into professional rugby in New Zealand[129] illustrates the potential benefits for competition of 'hard' salary caps in sport. After a major investigation into the proposal by the country's rugby federation (New Zealand Rugby Union) to introduce a salary cap, the New Zealand competition authority (the Commerce Commission) decided that the benefits of the hard salary cap for the public outweighed the anti-competitive effects. It was held that the cap would lead to good players being more evenly shared between teams which would lead to a more balanced competition leading to greater public enjoyment. The Commission examined the economic literature on the 'uncertainty of outcome hypothesis', (that public demand for, and enjoyment of, sport increases when there is equal competition between well-matched teams). It is generally assumed that 'uncertainty of outcome' is an important determinant of demand for sports competitions from paying supporters.[130] The Commission also studied evidence of the effect on the size of television audiences of a league in which standards of play were raised in consequence of talent being spread across teams as a result of a salary cap (which prevented isolated clubs pulling away by signing all the top players).

There is no evidence that UEFA conducted any such enquiry into the potential negative impact on competition of the 'break-even' rule. European law has 'established a rule of reason within the analytical framework set out in article 101(1) TFEU, to take account of the specificities of sport' but this only partly obviates the requirement for the kind of detailed economic enquiry undertaken by the New Zealand Commission into the conditions for exemption set out in the equivalent of Article 101(3) TFEU.[131]

An alternative to salary caps as a means of preventing football club insolvency, is the requirement for equity investors to provide a bank guarantee.[132] In June 2015 UEFA announced an amendment to the FFP Regulations, whereby clubs can submit voluntary agreement applications by December 31 of the preceding year, with funds committed in advance and guaranteed over the agreement period. Former UEFA president Michel Platini, commented that this would allow clubs to move beyond the strict limits of the 'break-even' rule, and that the revised amendments provide for football clubs to move from 'austerity to sustainable growth'.[133]

6 Conclusions

Garcia and Weatherill characterised the political settlement that brought about Article 165 TFEU as the 'next best' solution from the perspective of sports governing bodies to sport being given exemption from the treaty, the intent being to 'write sport into the Treaty in a way that would constrain the interventionist tendencies of the EU's institutions.'[134] The story of the FFP Regulations and how the EC has responded to them bears this out, and illustrates the

[124] Davies (2010), p. 445.

[125] Basnier (2014), p. 155.

[126] Currently the salary cap for each of the eighteen first class counties is a maximum of £2 million a year on the salaries of all its playing staff. For the 2014/15 season the salary cap in the English rugby union Premiership is £4.76 million, with additional credit of £30,000 each for up to eight players graduating from the club's academy (youth players who have come up through the club's youth system). In addition each club is allowed one player's wages (subject to certain conditions designed to prevent clubs signing up rival clubs' better players) to be exempt from the salary cap.

[127] Conn (2015).

[128] £5.5 billion from 2013–2016. This resulted for the 2013/14 season in players' pay increasing by around 5.5 % against an overall income growth of 22 %. The year after the introduction of the new rules, the 2013–2014 season, for which the clubs published financial results in April 2015, the FAPL overall made a profit (£198 million) for the first time in 16 years, compared to a £291 million loss the previous year, see Conn (2015).

[129] Basnier (2014).

[130] Szymanski (2003), p. 1137. Although as Vopel points out the long term competitive equilibrium of European football is possibly more dependent on the size of the domestic market (in terms for example of

Footnote 130 continued
population, income per capita, interest in football) rather than individual patrons, see Vopel, (2011), p. 58.

[131] Although there is an argument that the statutory exemption does not apply in any event in cases of by "object" restrictions of competition in horizontal agreements like the Regulations. See European Commission Communication (2004), p. 97.

[132] Dupont (2013).

[133] This was in response to the legal proceedings described at n 12 *supra*. It is evidence of itself that the 'break-even' rule is vulnerable to challenge under EU competition law, and therefore supports the thesis of this article. For details of the amendments to the 'break-even' rule, with exceptions introduced also for clubs in countries where the market is considered to have structural economic deficiencies, see 11 *supra* n UEFA (2015b).

[134] Garcia and Weatherill (2012), p. 23.

continuing uncertainty as to how 'hard' EU law is applied to sporting bodies and their rules by the EC.

The EC's approach to the FFP Regulations demonstrates the amorphous nature of EU sports law and the political strength of UEFA; specifically it illustrates the EC's lack of ambition in strictly enforcing competition law in the sports sector (it prefers to promote 'social dialogue' even when the parties to the dialogue have a striking inequality of bargaining position). It is perhaps understandable that the EC has supported UEFA over Financial Fair Play, which has (for the time being) discouraged the elite clubs breaking away from UEFA. The EC would prefer UEFA to remain the undisputed regulator of European football at all levels under the paradigm of the (so-called by the EC) 'European model of sport', with its pyramid system of governance.[135] UEFA's regulation of the whole European footballing pyramid, from the wealthiest clubs to the amateur game, must be understood in the context of the influence (a product of their commercial success) of the dominant clubs of the ECA, and ultimately the potential for the 'super clubs' to form a 'break-away' super league in place of UEFA's competitions.[136]

Superficially, it appears that the FFP Regulations achieve their intended object. UEFA has stated that the FFP Regulations (specifically the 'break-even' requirement) have had a very positive impact on the scale of overdue payables of licensed clubs which had decreased from €57 million in June 2011 to €8 million in June 2014, while aggregate losses reported by Europe's first-division clubs in the 2013 financial year had gone down to €800 million from a deficit of €1.7 billion in 2011.[137]

However, the 'break-even' requirement of the FFP Regulations has created a cartel, an 'oligopoleague', which makes it very difficult for clubs to challenge existing members of the ECA for success and participation in UEFA's competitions (the Champions League and the Europa League).[138]

It is unlikely that UEFA could prove to the satisfaction of the CJEU that the anti-competitive effect of the FFP Regulations (the cartel effect) is a proportionate response to an inherent requirement for regulation by UEFA, i.e., that 'the consequential effects restrictive of competition are inherent in the pursuit of [their] objectives and are proportionate to them'.[139] This is because there are alternative measures available to cure the problem of overinvestment in top European football clubs, which would not stifle competition between investors in football clubs. One such measure would be a hard salary cap, which has the added benefit, by sharing top players around clubs, of creating fairer competition, leading to a more interesting spectacle for the consumer, potentially, therefore, proving in the long term more financially rewarding for the sport as a whole.[140] Another measure capable of preventing football club insolvency, not so restrictive of competition between investors, would be the requirement of a bank guarantee to secure debt.[141] On proportionality grounds the 'breakeven' requirement of the FFP Regulations is therefore hard to defend under the *Wouters* test. In any event, UEFA would first have to demonstrate why its original licensing rules were deemed inadequate to restrain overspending and the risk of clubs becoming insolvent.[142] Any legal analysis of the 'proportionality' of the 'break-even' rule would also need to consider the various other means capable of curing the potential for insolvency brought about by

[135] See European Commission (2011).

[136] See BBC (2016). In January 2016 Karl-Heinz Rummenigge, chief executive of Bayern Munich FC, and one of 15 on the executive board of the ECA (see http://www.ecaeurope.com/about-eca/structure/eca-executive-board/), described the latest initiative by the top European clubs to form a super league of 20 teams from Italy, England, Spain, Germany and France (with direct entry into the tournament rather than as happens currently qualification to the UEFA competitions through their domestic league position in the previous season): 'A super league outside of the Champions League is being born. It will either be led by Uefa or by a separate entity, because there is a limit to how much money can be made.' There is surely no coincidence in the fact that this initiative coincided with another ECA Executive board member Manchester United FC, facing omission from the Champions League for the 2016/17 season through poor performance in the FAPL in the 2015/16 season. Manchester United FC is listed by Forbes as just outside the top 5 richest sports club globally with a value of $3.1 billion, see Lutz (2015). Geey (2012) reports that some of the Annex XI provisions of the FFP Regulations (the exclusion of investment in infrastructure and youth development as football expenditure in calculating break-even) were included after the ECA insisted on their inclusion. According to Müller et al. (2012) at 134 the ECA successfully lobbied for the exclusion of player contracts undertaken prior to June 2010 from the break-even calculations for the first two monitoring periods.

[137] UEFA (2014).

[138] Petit (2014). The closing stages of the FAPL 2015/16 season have been marked by the emergence of Leicester City FC as contenders for champions, in place of the better-heeled clubs from Manchester and of course the previous year's winners Chelsea FC, and they may be described as the exception to the rule that money buys success (for which see the one sided French league season 2015/16 where Paris St Germain FC, the richest club, and interestingly the first recipients of a sanction under the break-even rule of the FFP Regulations (see Serby 2014b), are completely unchallenged). The response to Leicester's success is the situation described in n 137 above, which reinforces the sense of a cartel.

[139] Meca-Medina, n 27 *supra,* para 42.

[140] The FAPL has its own Financial Fair Play rules which include an element of a hard salary cap since they restrict the proportion of revenue derived from the television rights deal the Premier League's clubs can spend on wages; see further Conn (2015).

[141] See further Dupont (2013).

[142] i.e. the continuing requirement for a licence applicant to prove that as of 31 March preceding the season for which a licence is applied for that it has no overdue payables, now Annex VIII of the FFP Regulations.

overinvestment in professional football clubs. For example the so-called 'Football Creditors rule'[143] system employed in English football for many years, has largely achieved its objective of ensuring football clubs meet their debts to other clubs, (incurred typically though transfer deals) thus preventing the occurrence of a 'domino' effect leading to multiple club insolvencies. Lindholm suggests as further alternative solutions to overinvestment: the reduction of compensation for clubs taking part in top competitions (to mitigate the consequences of the 'rat race' phenomenon); revenue sharing; banning cash trade of players and a luxury tax.[144]

Although on 16 July 2015 the CJEU declared the reference to it of the Striani claim (that the FFP Regulations infringe *inter alia* EU competition law) by the Belgian national court under Article 267 TFEU manifestly inadmissible, this was certainly not a substantive ruling on the merits of the case.[145] It was merely a reflection of the lower court's lack of internal logic in referring to the CJEU a matter it itself had ruled it could not rule on, on jurisdictional grounds.[146] UEFA's decision to amend the FFP Regulations in June 2015, to relax the rules on investment in football clubs, immediately prior to the CJEU ruling, suggests a certain lack of confidence in their belief that the FFP Regulations comply with EU competition law.[147]

How then to explain the attitude of the EC to the FFP Regulations, when there is a strong *prima facie* case that they infringe EU competition law? Under the typology devised by Terpan for soft and hard norms in the EU, the EU legal order is complex, comprising both hard and soft law, soft law comprising both legally binding and non-binding norms.[148] EC sports law policy, despite now having a basis in Treaty, supplementing the (mainly antecedent) jurisprudence of the CJEU, lacks any clear 'hard' obligation, and is denuded by the ambiguous Treaty concepts of the 'specificity of sport' and 'fairness'.[149] This lack of 'hard' obligation is demonstrated, and exacerbated by, the deference shown by the EC to sporting federations, in particular UEFA, in applying competition law to the rules of sporting bodies (such as the Financial Fair Play Regulations).

The preference of the EC for a collaborative form of 'soft law' rather than enforcement/obligation of 'hard' competition law as a basis for its sports policy was evidenced by the joint announcement in October 2014 that representatives of UEFA and the EC would institute a joint working party to consider European football policy. The official announcement (in an EC Decision of 14 October 2014), stated that the bodies: 'share a common goal to promote and safeguard the values of fairness and openness in sport in their respective areas of action…'.[150] With regard to Financial Fair Play the statement read: 'subject to compliance with competition law, measures to encourage greater rationality and discipline in club finances with a focus on the long term as opposed to the short-term, such as the Financial Fair Play initiative, contribute to the sustainable development and healthy growth of sport in Europe.' As Bret and Watson rightly point out, the EC's ability to regulate competition in matters arising from UEFA initiatives is constrained by this 3-year agreement.[151]

In the so-called ENIC reference to the EC in 2000, (in which the complainant alleged that UEFA's rule prohibiting multiple investment in football clubs infringed EU competition law), UEFA submitted it did not have 'a legal duty to divine the least restrictive alternative to protect integrity of competition,' and nor, argued UEFA, was it for the EC to assess whether there was a less restrictive alternative, 'since that would mean that the Commission would end up as the de facto regulator for sport'.[152] Since

[143] See Serby (2014a).

[144] Lindholm (2010) Although the objective of the FFP Regulations is not to restore competitive balance to the higher leagues in European football, this could be achieved through such a redistribution mechanism requiring wealthier clubs to share resources with less profitable clubs. Some view this as impracticable in the context of European sport with its system of open leagues, although it has been successful in the United States system of 'closed' leagues. A 'luxury tax' is arguably less restrictive of free competition between investors in football clubs. Under this proposal a tax on salary expenditure over a certain limit is redistributed to less wealthy teams; see also Szymanski (2003) at 1172 and Vopel (2011) at 58.

[145] Case C-299/15 *Striani & Others*, ECLI:EU:C:2015:519; see discussion above at n 12.

[146] For further analysis of the CJEU ruling and why it is not substantive, see Bastianon (2015) at 27 who states of the ruling of the CJEU on 16 July 2015, 'to date there is no formal decision that has assessed the compatability of FFP with EU law. From this point of view UEFA can only claim to have won a battle not the war'.

[147] UEFA (2015a). See further n 110 above.

[148] Terpan (2015), p. 72.

[149] These terms are used in TFEU Article 165.

[150] European Commission (2014b).

[151] Brett and Watkins (2014).

[152] Monti (2002) at para 21. The EC, relying on Court of Justice authority, (Case C-41/90 *Ĥfner v Macroton* [1991] ECR I- 1979.; Case T-513/93 *CNSD v Commission,* [2000] ECR, paragraph 39; Case 71/74 *FRUBO* [1975] ECR, p. 563) concluded that, 'the possible effect on the freedom of action of clubs and investors is inherent to the very existence of credible UEFA competitions, and in any case, it [the rule] does not lead to a limitation on the freedom of action of clubs and investors that goes beyond what is necessary to ensure its legitimate aim of protecting the uncertainty of the results and giving the public the right perception as to the integrity of the UEFA competitions *with a view to ensure their proper functioning*'. The EC concluded therefore that the rule fell outside the scope of Article 81(1), even though it accepted that the rule suppressed demand, and that neither did it fall foul of Article 82 since there was no evidence of any discrimination in the way the rule was applied, so therefore no abuse. See also European Commission (2002)

the ENIC case, the EU has formally assumed a competence in sport through Article 165, and arguably the EC has staked a claim to be a de facto EU sports regulator[153]:

> Through its dialogue with sport stakeholders, the Commission will continue its efforts to explain, on a theme-per-theme basis, the relation between EU law and sporting rules in professional and amateur sport. As requested by Member States and the sport movement in the consultation, the Commission is committed to supporting an appropriate interpretation of the concept of the specific nature of sport and will continue to provide guidance in this regard. Regarding the application of EU competition law, the Commission will continue to apply the procedure as foreseen in Regulation (EC) No 1/2003.[154]

However, during this process whereby the EC has assumed a steering role over sports governing bodies, there appears to have been a watering down of the original principles of EU sports law when they are applied by the EC; a 'politicization of public enforcement of competition law' which has led to the 'generous treatment of sport and football cases'.[155] Or as Bastianon puts it in relation to the FFP Regulations: 'an outside observer could reasonably think that the Commission is not fully convinced of the legitimacy of FFP but does not want to be the first to clearly say it because of a kind of deference towards UEFA.'[156]

Does EC sports law policy qualify in Terpan's categorisation as a 'soft law' norm, i.e. soft obligation/hard enforcement (since the effectiveness of soft rules depends on a strong shadow of hierarchy)?[157] EC policy towards the FFP Regulations can better be described as the delegalisation of the legal norm that where the sporting rules of sports governing bodies have an anti-competitive effect they are lawful only insofar as they are proportionate.

[153] See n 50 above and Parrish's assertion of a role in regulating sports governance by the EU institutions.

[154] European Commission (2011) at 4.2 'the specific nature of sport'

[155] Geeraert and Drieskens (2015).

[156] Bastianon (2015), p. 39.

[157] Terpan (2015) at 73–76; it should be acknowledged that the imprecision of EU sports law arguably denies it the status of 'hard' law under the definition of hard law proposed by Abbot et al (under which law is only hard if it has obligation, precision and delegation), see Terpan (2015), p. 72. Terpan's definition of law allows for an element of imprecision, a quality that helps define the intensity of the obligation.

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