

Cartel and champagne solidarity: piercing the veil on UEFA's hold over European football

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LIST OF ABBREVIATIONS:

CJEU	Court of Justice of the European Union
EC	European Commission
ECA	European Club Association
ECJ	European Court of Justice
EP	European Parliament
ESL	European Sup
EU	European Union
FIFA	International Federation of Football Association
FIFPro	International Federation of Professional Players
GC	General Court of European Union
MLB	Major League Basketball
MLS	Major League Soccer
NBA	National Basketball Association

NCAA	National Collegiate Athletic Association
NFL	National Football League
NHL	National Hockey League
SBG	Sports Governing Body
TFEU	Treaty on the Functioning of the European Union
UCL	UEFA Champions League
UEFA	Union of European Football Associations
UEL	UEFA Europa League

TABLE OF CASES:

Bosman	Case C-415/93 Union Royale Belge Sociétés de Football Association and others v. Bosman and others [1995] ECLI:EU:C:1995:463
Chaleroi	C-243/06 SA Sporting du Pays de Charleroi, G14 Groupment des clubs de football européens v Fédération internationale de football association (FIFA), removed from the Court's registrar [2008] ECLI:EU:2008:649

ENIC	Case COMP/37 806: ENIC/UEFA Commission Decision [2002] IP/02/942.
FIA	Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163—Notification of FIA Regulations, COMP/36.638—Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776—GTR/FIA and others (2001/C 169/03).
ISU	Case T-93/18 International Skating Union v European Commission [2020] ECLI:EU:T:2020:610
Meca-Medina	Case C-519/04 David Meca Medina and Igor Majcen v Commission [2006] ECLI:EU: C:2006:492
MOTOE	Case C-49/07 Motosykletistiki Omospondia Ellados NPID (MOTOE) Elliniko Dimosio [2008] ECLI:EU:C:2008:376
Piau	Case T-193/02 Piau v Commission [2005] ECLI:EU:C:2005:22
Wouters	Case C-309/99 J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECLI:EU:C:2002:98

TABLE OF LEGISLATION:

TFEU	Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01
UEFA Statute	UEFA Statutes – Rules of Procedure of the UEFA Congress, Regulations governing the Implementation of the UEFA Statutes, Edition 2020
White Paper on Sport	Commission White Paper on Sport, Brussels 11 July 2007 COM(2007) 391 final, (White Paper on Sport)

I. INTRODUCTION

1.1 Problem Statement

Since the formative breakaway league of European football was plotted, known as “Project Gandalf”, and spearheaded by Media Partners International, the status quo of European football has been under threat.¹ This threat consisted of an elite band of clubs, over-zealous of the game’s increasing commercial appeal, pushing for a greater share of the pie. Indeed, a string of compromises was needed just to keep these clubs, known as the G14 at the time, in the fold.

In spite of this, the ‘European SuperLeague’ was unveiled in all its glory on Monday, April 19th, 2021, as twelve clubs from England, Spain and Italy announced a de facto *coup d’etat* against UEFA. The constitution of the league was to be as follows: the twelve ‘super clubs’ would splinter from the UEFA Champions League to create a separate pan-European twenty-team league. Fifteen of the twenty teams would retain a permanent status in this league with the remaining five places being awarded to teams based on their performance in domestic competitions. As the twelve founding clubs would remain permanent members, the league would at least be partially closed with only limited opportunities for promotion and relegation for the clubs invited to join. The ESL would feature matches in a mid-week format against each other throughout the season while the participating clubs would remain part of their respective national associations and continue to play in their domestic leagues (or at least this is what they had hoped for).²

The golden goose for the clubs lay in the commercial opportunities promised by the ESL. Since the ESL would operate beyond the scope of UEFA, the clubs would be free to commercially exploit their product (i.e. the matches). Some of the figures projected that the ESL could generate up to 500 million euros in revenue per club each year alongside a signing bonus of 233 million euros (double the amount that the winner of the Champions League currently

¹ Stephen Weatherill, ‘Never let a good fiasco go to waste: why and how the governance of European football should be reformed after the demise of the “SuperLeague”’ (*EU Law Analysis*, 21 April 2021) < <http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html> >.

² For an overview of how the ESL would operate, all details are contained on its website: < https://thesuperleague.nl/#who_we_are >.

receives).³ Moreover, the League would be bankrolled by private investment from JP Morgan. In light of the financial dent that clubs took during the Covid pandemic, the wealth promised by the ESL seemed too hard to resist.

What happened in the 48 hours following the ESL announcement was significant. Contrary to the closed nature of the League, the clubs raced to jump ship from the project with Twitter apologies and executive statements acknowledging responsibility for the fiasco. Resignations for prominent directors and architects of the ESL, Ed Woodward, and Andre Agnelli, followed and very soon the true motivation behind the League was laid bare for the public to see. Initially, it was the English clubs that moved to distance themselves from the ESL while Real Madrid, Barcelona, and Juventus, the clubs with the most precarious balance sheets, clung on. The reasons for its demise were two-fold; there was firstly the immediate threat of legal action from UEFA for violation of their statutes and memoranda of understanding which explicitly prohibit clubs from participating in unsanctioned leagues. On the other hand, there was the backlash from the footballing community which regarded this move as the culmination of profit-driven incentives which had been seeping into the game.⁴ The backlash deplored the greed of the clubs involved and the neglect shown for principles of sporting merit such as relegation/promotion, integrity, and solidarity.

Despite the rhetoric of the founding members, the ESL would have massively impacted the structure of European football. On a European level, it would have meant the hollowing out of the UEFA competitions (UCL, UEL, and UECL) and the resulting redistribution efforts that accompany them. Domestically, the financial package promised by the ESL to its participating clubs would completely distort the competitive balance of national leagues. How could Burnley expect to compete financially with any of the English ESL members in the Premier League if the revenues of the latter were multiplied? Finally, while the impact on the game at a grassroots level is impossible to quantify, one could imagine that the ESL would harm the game at this level as it centralizes more power to a smaller pool of clubs. With this backdrop, it is easy to

³ Floris de Witte and Jan Zglinski, 'The Idea of Europe in Football' (2021) LSE Law, Society and Economy Working Papers No. 17/2021 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973962>.

⁴ Rachael Obordo and Alfie Packham, 'Blatantly cynical: our readers react to Super League plans (*The Guardian Newspaper*, 20 April 2021) < <https://www.theguardian.com/football/2021/apr/20/european-super-league-blatantly-cold-cynical-fans-europe>>.

understand why the ESL whipped up such a frenzy of disdain – it was prima facie “anti-competitive, anti-fan, anti-football and fuelled by greed”.⁵

However, it is salient to point out that much of the dystopian labels tagged to the ESL stem from romantic illusions of a bygone era in European football. Many would argue that it ceased to have any sense of meritocracy or competitive balance a long time ago. The statistics don’t exactly undermine this point of view. While the 70s and 80s saw minnows such as Nottingham Forest, Hamburger SV, and Steaua Bucuresti reach the pinnacle of European glory, the teams competing in the latter stages of the UCL nowadays rarely change. This underscores the problem that there is less unpredictability within the game at the moment. The competitive landscape that allowed those minnows mentioned above to win the European Cup has been tampered with to the point that it no longer seems possible for such a romance story.

1.2 Aim and relevance

This research seeks to test the compatibility of UEFA’s restriction on clubs from competing in unsanctioned, alternative leagues with European competition law.⁶ Although the decisions of the CJEU in *ISU* and *MOTOE* suggest that there is greater scope for demonstrating that a sporting association, such as UEFA, is a dominant undertaking for the purposes of Article 102, I don’t believe that this is as plausible with respect to UEFA. The power held by the governing bodies in those aforementioned cases vis-à-vis the competitors of those sports is much stronger than the power wielded by UEFA against the ESL participating clubs. Nonetheless, UEFA’s rules that sanction clubs for participating in a breakaway league still fall under the auspices of a restrictive anti-competitive agreement as per Article 101. The focus then turns to whether these rules can be saved by the objective justification criteria enumerated in the *Wouters*⁷ judgment and applied in a sporting context in *Meca-Medina*.

This research is of practical and academic relevance as it contains an examination of the compatibility of UEFA rules with EU competition law. As a breakaway league of the

⁵ Ibid – opinion of football fan, Peter Brain (20), in contribution to the Guardian article above.

⁶ Article 49, UEFA Statutes - Rules of Procedure of the UEFA Congress: Regulations governing the Implementation of the UEFA Statutes.

⁷ Case C-309/99 *Wouters and Others* [2002] ECLI:EU:C:2002:98.

magnitude of the ESL has yet to materialize, there is little academic foreshadowing of the compatibility of the rules precluding such a league with EU law. Following on from the ESL announcement last year, the public now has access to the most comprehensive plans of what such a breakaway league would look like. Thus, my research will be able to avail of this new information to apply a more thorough application of EU competition law to the project than previously.

1.3 Research Question

With the aim of this research in mind, the research question for this thesis is as follows:

How does UEFA's rule prohibiting the formation of an unsanctioned breakaway league violate EU competition law and to what extent can it be considered as a legitimate justification in line with the *Wouters* criteria and consequently compatible with EU Competition Law? Furthermore, is there anything to be drawn from US sports practice that can help restore a degree of competitive balance in European football?

To answer the main research question, the following four sub-questions have been formulated:

1. What does the jurisprudence from the CJEU illuminate about EU law's evolving relationship with sports governance?
2. How does UEFA's Article 49 represent a *prima facie* violation of Article 101 TFEU?
3. Can UEFA's Article 49 be saved by the legitimate justification exception as established in *Wouters* and applied in *Meca-Medinah*?
4. What are the fundamental differences in how professional sport in the US and European football are organized and can the European model facilitate any of the mechanisms for competitive balance that are prevalent in the US?

1.4 Methodology

The research question requires a blend of descriptive, evaluative, and analytical research. The first sub-question provides the background to the analysis that will follow as it charts the jurisprudence of the CJEU related to the application of EU law to sport. To flesh out this

description, I employ doctrinal analysis such that the rulings of the court, and their implications, are set out coherently in chronological order.

Sub-question two simulates an application of EU competition law. I evaluate the compatibility of UEFA's restriction on clubs from competing in alternative leagues and competitions without the consent of UEFA under the guise of Article 101. This restriction, as stipulated in Article 49 of UEFA's governing statute, is assessed under the standard framework for an Article 101 case. Hence, I establish that UEFA is an "association of undertakings" as well as determining a relevant market definition. In addition, I analyse how Article 49 can be considered as an "agreement" and subsequently a "restriction by effect".

In sub-question 3, I will lean on the doctrinal analysis set out in answering sub-question one to evaluate whether the restriction inherent in Article 49 can be objectively justified on foot of the *Wouters* criteria. The *Wouters* criteria can be distilled to three conditions which will be applied individually to the case of UEFA's Article 49. As these conditions call for a more holistic outlook of the objectives of UEFA in implementing Article 49, I will touch on some more abstract or normative points related to football governance. In addition, one of the criteria concerns proportionality and whether there is a less restrictive means by which UEFA could achieve its stated objective. I will take this as an opportunity to elaborate further on the ESL and how this competition structure might be better positioned to achieve the aims of UEFA (but of course under a different guise).

The legal research adopted in this thesis is both practical-based and literature in nature. Literature research is particularly prominent in chapter two as I draw from various sources to capture the relationship between sport and EU law historically. The sources consulted include prominent centres for research such as the Asser International Sports Law Project which sponsors and publishes the research of academics on a range of issues related to sports and the law. Moreover, I used this resource to discover the literature of leading contributors like Katerina Pejtitlovic, Adam Lewis, Antoine Duval, Ben Van Rompuy, Stephen Weatherill, Tsalle Van Der Berg, and Matthew Holt, Richard Parrish and many more. To access the articles, books, and blog posts of these authors, I generally used the University's online library portal – WorldCat. The research becomes more practical-based when I apply the competition law principles found in decisional practice and CJEU jurisprudence to UEFA. At this stage, the thesis transitions into more of an analytical and practical style from the descriptive style which

preceded in chapter two. Moreover, I employ comparative research in chapter four by considering the US model of professional sports and whether any of the mechanisms for competitive balance are transferable to the European Model of Sport. Finally, OSCOLA (fourth edition, 2012) was used as the citation method for this thesis.⁸

1.5 Limitations

It must be acknowledged that there are some limitations to this research. Chief among them is the reality that no breakaway league of the scale presented by the ESL has ever materialized. While there were threats similar to the ESL in the past⁹, it remains a fact that Europe has never seen such an emanation as the ESL in full flight. Thus, simulating an application of competition law to a hypothetical situation entails a degree of guesswork as to how the league would affect the market for football. However, my research is fortunate seeing as the ESL plans, published in full at the time of its announcement, provide a blueprint for what a breakaway league would look like and how it would operate. Of course, my simulation of a competition case against both UEFA and a breakaway league reflects my understanding of their compatibility with EU law, and this may differ from the view of the EC or CJEU.

Moreover, my research includes a degree of speculation in the concluding chapter when I compare the competitive merits of the system governed by UEFA and that which a breakaway league would oversee. The implications of a breakaway league for the development of football generally in Europe are based on abstractions that I make about how such a league would alter the landscape of professional football organization and governance. Admittedly, there may arise a breakaway league that is conceivably pro-competitive and a perfectly plausible alternative to the status quo system that stands today. My research is quick to acknowledge this as a caveat because the failure of the ESL only buttresses a future attempt at breaking away seeing as the legal flaws of such a move were articulated by so many commentators in the aftermath.

⁸ See the long form manual for Oscola 4th edition here: <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012quickreferenceguide.pdf>.

⁹ Such as the Media Partners Proposal league and other emanations.

It must also be pointed out that there is a preliminary ruling pending from the CJEU on the legality of UEFA's Article 49 rule with EU Competition Law. This preliminary reference was made by Madrid's Commercial Court (Juzgado de lo Mercantil n.º 17 de Madrid, Spain) after the Company representing the ESL project successfully filed for an injunction preventing UEFA from sanctioning the clubs participating in the ESL or hindering any efforts to form the ESL. This ruling from the CJEU is expected in late 2022 or early 2023. Given the questions referred, this ruling should very clearly outline the CJEU's interpretation of UEFA's restrictions on a breakaway league.¹⁰ It will also provide an effective green light to the remaining ESL members (Real Madrid, Barcelona, and Juventus) to push ahead with plans for the new league without being sanctioned by UEFA. On the other hand, it might rule in favour of UEFA and deem that Article 49 is compatible with competition law. If this were to happen, then the ESL would become an even unlikelier project to materialize given that the Commission and Parliament also condemned the idea.¹¹

¹⁰ Case C-333/21: Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 17 de Madrid (Spain) lodged on 27 May 2021 — *European Super League Company, S.L. v Union of European Football Associations (UEFA) and Fédération Internationale de Football Association (FIFA)*.

¹¹ See Commission Vestager's comments in the aftermath of the ESL - < https://www.europarl.europa.eu/doceo/document/E-9-2021-002130-ASW_EN.html >.

II. FOOTBALL AND EU LAW

2.1 The historical deference of EU to Sport Governance

Prior to delving into the relationship of EU law with football, it is important to frame it in the context of how the EU generally perceives its role in sporting matters. The seeds of this relationship stretch back to the early years of the European Community which coincided with a growing commercialization of professional sports such as football. These two developments brought professional sport and EU law into the same orbit and was coined by Pejtitlovic as the crossroads between juridification and commercialization.¹² For the purposes of this research, I will examine this development through the lens of football, but it is important to note that a lot of compelling jurisprudence flows from cases which featured other sports.

The term *Lex Sportiva* was coined initially to describe the self-regulatory and autonomous governance of European sporting federations which led to a bespoke legal order that was separate from national, EU, and International Law.¹³ Essentially, this captured the rather unique niche that sport had carved out for itself as a transnational legal order with its own resolution mechanisms via bodies such as the Court of Arbitration for Sport (hereinafter referred to as CAS). In terms of power and scale, SGBs such as UEFA and FIFA accumulated state-like autonomy with the financialization of football which brought them closer to the ambit of European Law. However, these organizations largely survived legal scrutiny from the EU throughout the initial period of financialization of football. One of the central reasons for this is that the EU had no competence to interfere in the domain of sports for a long time. In the absence of any treaty-mandated competence, EU sports law emerged in a rather unconventional way. There were some cases and policy statements which asserted a level of soft law control over sporting federations, but the lack of a firm legislative basis meant that EU sports law was led by the hand of EU sports policy.¹⁴

¹² Katarina Pejtitlovic, *EU Sports Law and Breakaway Leagues in Football*, (TMC Asser Press 2015) at page 5.

¹³ Tom Serby, 'The state of EU sports law: lessons from UEFA's 'Financial Fair Play' regulations' [2016] 16((37-51) *The International Sports Law Journal*, page 38 < <https://link.springer.com/article/10.1007/s40318-016-0091-2> > accessed 26 June 2022.

¹⁴ Richard Parrish, *Sports law and policy in the European Union* (Manchester University Press 2003) < <https://library.oapen.org/bitstream/id/2cf8ea42-17fc-45f3-80e3-7c02426c417e/341375.pdf>>.

Consequently, sports law in Europe can be categorised into two separate groups.¹⁵ There is the aforementioned *Lex Sportiva* which encompasses the body of rules and regulations established by SGBs that have the sole responsibility to govern these rules. While this legal order was entirely self-designed and regulated by the organizations which created it, it was recognized by legislation and constitutions of Member States as well as EU policy documents as being legitimate. On the other hand, there is the body of law carved out of European legislative and judicial acts which deal with the concept of the ‘specificity of sport’ in some capacity. The ‘specificity of sport’ was the umbrella term used to describe the special nature of sport in the context of EU law. It stood for the notion that sporting practice and the sporting industry possess unique characteristics requiring it to have a special status under the law. It has been and remains pertinent in many EU Policy documents as well as being included in the TFEU reference to sport in Article 165.¹⁶

EU sports law eventually did emerge with the *Walrave* case in 1974.¹⁷ This seminal ruling established a contentious distinction between rules of a sporting nature and those of an economic nature which has underscored the relationship between EU law and sport ever since. The Court held that the practice of sporting activity is subject to EU law ‘in so far as it constitutes an economic activity within the meaning of Article 2 of the treaty’.¹⁸ While this put to bed any notion that sport enjoyed a blanket immunity from the clutches of EU law, it rendered its application conditional. This jurisdictional expansion continued with the ruling in *Dona* two years later.¹⁹ On the surface, this would seem to be a positive development for those who sought to bring the regulation of sport into the orbit of EU law. However, subsequent case law would indicate that this transition was slow and that the sporting exception remained in all but name.

¹⁵ Pijetlovic, page 16.

¹⁶ Art. 165, Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

¹⁷ Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405.

¹⁸ *Ibid* para 4.

¹⁹ Case 13-76 *Gaetano Dona v Mario Mantero* [1976] ECR 1333.

2.2 Bosman

Prior to *Bosman*, the Commission had only made four formal decisions in the field of sport and they were all made pursuant to Article 101 TFEU (previously Article 81 EC).²⁰ All of these decisions pertained solely to revenue-generating activities such as the acquisition of broadcasting rights.²¹ In these cases, the demarcation between rules relating to purely sporting matters on the one hand and economic matters on the other was quite clear. However, the line could not always be drawn so clearly and the lack of legislative certainty from the Commission left a lacuna for manipulation by sporting federations who still wielded considerable power over their athletes. *Bosman* was the catalyst for change.²²

Jean-Marc Bosman was a footballer at the Belgian football club, SA Royal Club Leigeois. Having come to the end of his contract period, he sought a transfer to another club in France which ultimately failed and left Bosman at the mercy of his parent Belgian club. At the time, player contracts were operated with an archaic system in European football. Essentially, a player whose contract had expired was still bound to their club until a transfer fee was negotiated with another club. If no fee could be negotiated, the club was obliged to offer the player a one-year extension on less favourable terms. Rejecting this offer, a player faced the prospect of suspension. This is precisely the state of affairs that befell Bosman. In addition to this rule, the Commission also considered the legality of the '3+2' rule which football associations imposed on clubs to limit the number of foreign-born players participating in domestic and UEFA competitions. In effect, this rule placed a de facto quota on football clubs in terms of how many non-native players they could have in their squad. Needless to say, the Court struck down this rule as it was patently violating the freedom of movement and work Articles.²³

²⁰ Ben Van Rompuy, 'The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations' (2015) *Maastricht Journal of European and Comparative Law*, 22(2), pp.179-208 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2767467>.

²¹ Commission Decision 93/403/EEC of 11 June 1993 (IV/32.150 – EBU/Eurovision System), [1993] OJ L 179/23.

²² Case C-415/93 *Union Royale Belge Sociétés de Football Association and others v. Bosman and others* [1995] ECR I-4921.

²³ *Ibid* paras 129-137.

While the Court acknowledged that football did possess characteristics unique from the commercial activity of other sectors in an economy, this did not exempt it from the application of EU law. Instead, the Court judged that any rule which prevented an individual from exercising a fundamental freedom guaranteed by the Treaty (freedom to work in Bosman's case) needed to be justified.²⁴ 'Justification' in this case is determined by whether the rule is seeking to pursue a legitimate objective compatible with the TFEU and is justified by the public interest, and whether the measures employed to achieve such an objective were proportionate. The Court found that the transfer system under examination in *Bosman* pursued a legitimate objective in maintaining a degree of competitive balance and promoting the development of young players. However, the means used to achieve these objectives were deemed to be unsuitable and disproportionate relative to the extent that they restricted the players' freedom of movement and work as enshrined in the Treaty.²⁵

The fact that the transfer system and nationality quotas under scrutiny in *Bosman* were rendered incompatible with the fundamental principles of EU law came as no surprise. In a way, it was symbolic of the attitude of UEFA in thinking they could so flagrantly circumvent the rules of the EU because of their self-perceived importance in the wider political landscape of Europe.²⁶ Along with many commentators, I believe the intransigence and arrogance demonstrated by UEFA just embodied the mentality of many sporting associations at the time that they genuinely believed they operated outside the confines of EU law.²⁷ Before *Bosman*, the prevailing belief in UEFA was characterised by hostility towards the EU but this changed as they began to see the Commission as an ally that they could cooperate with and get a legal rubber stamp on the new initiatives they had for European Football.

²⁴ Ibid para 121

²⁵ Ibid paras 92-114

²⁶ Matthew Holt, 'UEFA, Governance, and the Control of Club Competition in European Football. A report funded by the FIFA João Havelange Research Scholarship' (Football Governance Research Centre, London: Birkbeck University of London 2005) < <https://www.yumpu.com/en/document/view/41244924/uefa-governance-and-the-control-of-club-competition-in-> >.

²⁷ David McArdle, *From Boot Money to Bosman: Football, Society and the Law* (Cavendish 2000)

2.3 Post-Bosman

Spurred by the opinion of Advocate General Lenz in *Bosman*, the Commission became more interventionist in the arena of sports regulation. However, the legislative backing for this intervention was slow to arrive after *Bosman* because of the political lobbying that was going on at the European Institutions by two ideologically opposed groups.²⁸ One author describes a heavily politicized landscape where two rival advocacy coalitions emerged in the aftermath of *Bosman*, one campaigning for a protectionist policy of the sporting exception and the other suing for more regulatory intervention in the sector.²⁹ The sports policy of the EU represented a middle ground between the ideas of these two groups. This perhaps explains why the Union refrained from instituting a legal basis or competence to legislate in sport in the Treaty but did introduce ‘soft law’ proposals such as the Declaration of Sport to the Amsterdam Treaty³⁰ and the Helsinki Report.³¹ The impact of these proposals could be debated but they both explicitly acknowledge the social, educational and cultural functions of sport and the importance in preserving autonomy for the federations responsible for governance. In this sense, it can be understood that *Bosman* did not transpire to be such a death blow for SGB such as UEFA. The ruling resulted in greater communication between UEFA and the various EU stakeholders, a relationship that the footballing organization realized they could leverage to their advantage. Thus, engagement was chosen over dismissal.³²

2.4 Meca-Medina and Wouters

A significant collision between EU competition law and sport played out in the case of *Meca-Medina*.³³ It is significant because the CJEU finally rejected the ‘purely sporting’ exception that had lingered after the ruling in *Walrave* and held that ‘the mere fact that a rule is purely

²⁸ Ibid 58

²⁹ Parrish fn 11 at page 250

³⁰ Declaration 29, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on sport, OJ C 340, 10 November 1997.

³¹ COM (1999) 644, ‘Report from the Commission to the European Council with a View to safeguarding Sport Structures and Maintaining Social Significance of Sport within the Community Framework: The Helsinki Report on Sport’ 1/12/1999.

³² Jonathan Hill, head of EU office, UEFA, personal interview, 19th January 2005 from Holt report in FN 9

³³ Case C-519/04 *David Meca-Medina and Igor Majicen v Commission* [2006] ECR I-6991

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'.³⁴ The effect of this was that sporting practices could no longer exist outside of EU law and avail of the sporting/non-economic exception. However, the CJEU carved out an escape route for SGBs by adopting the *Wouters* 'objective justification' criteria. This enabled an association to justify the restrictive element of their rules by demonstrating that they were part of a legitimate objective pursued by the rule, inherent to attaining such objective and a proportionate result of the rule.³⁵ In the case of *Meca-Medina*, the rule under scrutiny concerned the banning of athletes for violation of anti-doping regulations. The Court, reinforcing their tolerance of sport's unique characteristics, understood that the anti-doping regulations were part of a broader objective to preserve the merit and integrity of competition within the sport of swimming. They also deemed the knock-on effect on the athlete's freedom to participate as being inherent in the application of anti-doping rules as well as the ban being a proportionate penalty. This simple three-step criteria gave sporting associations an additional layer of protection from competition rules in comparison to undertakings in other sectors of an economy that had to satisfy the more stringent Article 101(3) test for justification.

The *Meca-Medina* ruling is a testament to the evolution of the EU's attitude towards sports regulation following *Bosman*. It implicitly recognizes that while the overlap of sporting practice and EU law is inevitable in today's world of commercialized professional sport, this does mean that the law should set aside the special nature of sport. It grants sporting bodies the opportunity to defend their rules and argue that even if they are contrary to the freedoms or competition provisions enshrined in the TFEU, they are justifiable in light of the objectives that are integral to the sport under question such as credible competition, competitive balance, integrity and merit and so on.³⁶ This culminated in the eventual inclusion of the 'specificity of sport' concept in the TFEU after the Lisbon Treaty. Mirroring much of the jurisprudence, Article 165(1) appears to give the Union a constitutional basis for interfering with the regulation and governance of sport. However, distilling a legislative remit from this provision is impossible which means that it amounts to little more than a token conferral of power. In

³⁴ Ibid, para 27 of ECJ judgment.

³⁵ Ibid, paras 45 and 47.

³⁶ Stephen Weatherill, *European sports law* (Asser International Sports Law Series 2014) at page 497-506 < <https://link.springer.com/book/10.1007/978-90-6704-939-9?page=2&oscar-books=true#toc> >.

reality, Article 165 merely reiterates the rhetoric of the Court in *Meca-Medina* that the special nature of sport necessitates a large degree of autonomy for sporting associations to self-regulate. Weatherill describes this as ‘the strategy of empowering the EU in order to restrain it’.³⁷

In summary, the “specificity of sport” remains a relevant if somewhat misleading concept. Despite being undefined, it has to come to represent the Commission and Court’s deference to the autonomy of sporting federations in organizing and governing their affairs. In the context of the research to come, it is important to bear this attitude in mind. Seeing as the entire structure of European football could potentially be changed by a ruling which prohibits UEFA’s Article 49 restriction, we need to ask ourselves whether this is a policy move that the EU would like to make? The relationship between sport and the EU chronicled above suggests that the legal violation would need to be pretty serious for the EU to make such a dramatic call. However, the precedent for boldness is there with the Bosman ruling.

³⁷ Borja Garcia & Stephen Weatherill, ‘Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon’ (2011) 19(2):238 *Journal of European Public Policy* < <https://www.tandfonline.com/doi/full/10.1080/13501763.2011.609710> >.

III: UEFA’S RESTRICTION ON THE CREATION OF A BREAKAWAY LEAGUE

3.1 UEFA under the competition microscope

In this chapter, I will focus on UEFA from a competition law perspective and analyse the compatibility of their restriction on the formation of breakaway leagues in Europe. Entrenched in UEFA’s constitutional statutes is the jurisdiction to abolish competitions featuring teams that are part of the member National Associations.³⁸ UEFA also reserves the ability to authorise proposals for alternative competitions outside of the existing European football calendar. On first viewing, these restrictions are inimical to competition law as they appear to foreclose the possibility of competition. However, such a finding is incomplete without considering the nuances that accompany the organization and governance of professional football. I will simulate an application of competition law to the aforementioned UEFA rules as if I was the European Commission conducting an investigation.

3.2 European Model of football

Before carrying out this assessment, it is important to explain the structure of European football. As mentioned earlier, the EU has been quite explicit in policy documents and declarations that sport in Europe serves a function transcending the confines of competition and entertainment.³⁹ Quite conversely, sport is intertwined with the very fabric of European life. The ‘specificity of sport’ is a concept that speaks to this, holding value in the societal role of sport to bring people together and serve as a tool for socio-cultural development. The emphasis on the social significance of sport was earmarked in the Amsterdam and Nice declarations of sport as an important force in pushing back against the rising commercialization

³⁸ Article 49(1), Part XI Competitions, UEFA Statutes – Rules of Procedure of the UEFA Congress; Regulations governing the implementation of the UEFA Statutes, Edition 2020.

³⁹ ‘Professional Sport in the Internal Market, project no. IP/A/IMCO/ST/2005-004, Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament (September 2005) at page 27

in sports such as football.⁴⁰ It was believed that this trend of profit-maximization would corrupt the European model of sport and result in an “Americanization” and market-orientated approach to sport which was antithetical to the European ideology.⁴¹

While the merits of this thinking can be debated, it left the European model largely intact as the ‘single federation per sport’ persisted. In the context of football, this meant that UEFA sat on top of a pyramidal structure with the mandate of organizing the pinnacle competitions of European football such as the UCL, European Championships, and the UEL. Beneath UEFA are the National football associations which form the constituent members of UEFA and organize the affairs of domestic leagues and cups. The remaining layers of the pyramid are comprised of professional clubs, amateur associations, amateur clubs, and an array of stakeholders. There is a considerable degree of symmetry between these layers seeing as they all cooperate through member associations and various chains of communication. There is also a high degree of interdependency between each layer which is another unique aspect of sport in the economic sense because there is an incentive to ensure that each ‘cog in the machine’ remains supported. For example, there is a vested interest in professional football clubs ensuring that the amateur game is well backed because the grassroots structures of these clubs provide the talent pool for professional clubs to select their squads and maximise their chance of success. The pyramidal structure is generally regarded as both the most efficient means of organization and the model which upholds the sanctity of the values inherent in European sport.⁴²

3.3 Competition analysis

An examination of UEFA through a competition lens is bound to be complex and multi-faceted. Practitioners and commentators alike have attempted such an exercise in the context of other

⁴⁰ Declaration on the specific characteristics of sport and its social function in Europe, of which account should be taken in implementing common policies 13948/00, Annex to the presidency Conclusions following of sport Nice (2001) annexed to the Presidency Conclusions of the Nice European Council Meeting of 7,8 and 9 December 2000 (‘Nice Declaration’); Treaty of Amsterdam—Presidency Conclusions (2 October 1997) OJ 1997 C 340, 10/11/1999, (No. 29: Declaration on Sport).

⁴¹ European Commission, The European Model of Sports, Consultation Document of DG X (September 2008) para 1.3.

⁴² European Model of Sport, para 3.2; Helsinki Report, para 4.2.3; Commission Staff Working Document, para 3.4.

conflicts such as the legality of UEFA's rules on transfers (Bosman), broadcasting agreements (UEFA Champions League case), and training compensation (Lehtonen). However, the only legal challenge to UEFA's restrictions on alternative league formations is the one currently pending a preliminary ruling and instigated by the company behind the ESL project. The questions forwarded by the referring court in this instance provide some insight into how such a challenge against UEFA would look. While I have leaned on this insight for the analysis that I conduct, it is important to note that I deviate from the angle that the applicants appear to take in that case against UEFA.

3.4 Status of UEFA as an association of undertakings

It is submitted that the UEFA constitutes an association of undertakings within the meaning of Article 101. To qualify this claim, we need to first consider the defining features of an 'undertaking'. According to the CJEU and EC, an undertaking is 'any entity engaged in an economic activity, that is an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed'.⁴³ This definition clearly outlines that the classification of an entity as an undertaking depends on how it functionally operates, rather than its legal status.

As stipulated in their constitution, UEFA is a grouping together of national football associations across Europe which are members of the UEFA organization.⁴⁴ National football associations consist of football clubs, professional and amateur alike, engaged in the economic activity of football. Football is considered an economic activity by way of the fact that the product it provides, i.e. matches and leagues, are packaged and sold to the public through gate receipts, sponsorship, TV broadcasting deals, advertising, etc.⁴⁵ Therefore, this renders clubs as "undertakings". Moving back up the pyramid, if clubs are undertakings and national football associations are simply groupings of these clubs then they can be deemed as associations of

⁴³ See Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [1998] OJ C 66.

⁴⁴ Article 5, UEFA Statutes – Rules of Procedure of the UEFA Congress, Regulations governing the Implementation of the UEFA Statutes, Edition 2020 (hereinafter referred to as "UEFA Statutes").

⁴⁵ *Bosman*, para 3; *Piau*, para 69; *Lehtonen*, para 2.

undertakings. Employing the same logic, the Commission classified UEFA as an association of undertakings.⁴⁶

The EC and CJEU have also determined that UEFA can be regarded as a sole undertaking for the purposes of organizing club competitions in European club competitions.⁴⁷ The malleability of this classification suggests that the EC will vary its approach depending on the issue at stake and what the relevant market is. If UEFA is categorized as an undertaking, this takes it out of the domain of Article 101 and into the domain of Article 102. This would change the strategy of the Commission. It would mean that an Article 101 case is no longer viable because it requires an agreement between separate entities. What motivates the Commission's approach to pursue either Article 101 or 102 seems to depend on whether the SGB is commercially active on the market under consideration or is merely adopting a regulatory role and applying rules to that market. In the case of the former, the SGB is deemed to be an undertaking as per the *FIFA World Cup 1990* case.⁴⁸ In the case of the latter, the SGB will be deemed as an association of undertakings as per *Meca-Medina* and *Piau*.⁴⁹ Therefore, it is quite clear that there is a synergy between market definition and entity classification in cases involving SGBs like UEFA.

However, along with some prominent authors, I would not envisage the Commission taking this route because an Article 102 case means that dominance needs to be established as well.⁵⁰ In the case of UEFA, it would appear that they have prima facie dominance based on their market share being virtually 100%. Yet the internal dynamics of UEFA would suggest that this quantitative assessment is slightly misleading. For quite a long time, UEFA has been pandering to the strongest and most politically influential clubs in European football. These clubs banded together in groups such as the G14, but they are now essentially the power figures behind the ECA. The ECA has significant soft power within UEFA with their presence on the executive committee and almost always their interests are catered for in any decision-making. The most recent example of this would be the introduction of the qualification entitlements for clubs

⁴⁶ Case COMP/37 806: *ENIC/UEFA* Commission Decision [2002] IP/02/942.

⁴⁷ *Ibid* para 25.

⁴⁸ Commission Decision in Case Cases 33.384 and 33.378—*Distribution of package tours during the 1990 World Cup* [1992] OJ L 326/31.

⁴⁹ Case C-519/04 *David Meca-Medina and Igor Majcen v Commission* [2004] ECR II-3291; Case C-171/05 *Laurent Piau v Commission* [2005] ECR II-209

⁵⁰ Pejtitlovic, page 258 and 259.

based on their UEFA coefficient ranking.⁵¹ In short, this enables clubs such as Manchester United and AC Milan to still participate in the UCL even if they miss out on domestic qualification because of their strong historical pedigree in European football. However, this notion that the clubs are a sufficient counterweight to UEFA's power implicitly assumes that the clubs are perceived as functionally separate entities to UEFA. Of course, clubs are stand-alone entities when you consider them 'in their own right'. However, when taken under that auspice there is an argument to be made that they represent an association of undertakings operating under the umbrella of UEFA. In a sense, UEFA represents an association of an association of undertakings.⁵²

3.4 Product definition

To even initiate such a case, an actual product needs to be identified that UEFA is selling/marketing to consumers. For many, this might seem obvious but the multi-dimensional nature of stakeholders in European football means that many products are being transacted on simultaneously by UEFA. On a basic level, the match is the product that football delivers. This is the contest between two teams which are competing with each other as part of a wider competition such as the UCL. There are a number of components to this product that make it attractive to consumers such as the level of skill on display, the aspects of rivalry which might exist between the teams, and most importantly – the unpredictability of the result. Alongside the match, commercial opportunities for the stakeholders arise. For example, the participating clubs earn revenue through ticket sales and broadcasting revenues which feed back into the ecosystem of the game via solidarity and redistribution mechanisms. Advertisers and sponsors use the match to market their brands which generates revenue-earning opportunities for them.

However, the product is two-sided in football as the match is just an element of the league or competition that it occurs in. Take the English Premier League as an example, the game between Liverpool and Manchester United is probably the fiercest rivalry across the historical spectrum of British football. While the match is a feature of the bragging rights that both sets of fans will claim, it is more important where the respective clubs finish in the league which is

⁵¹ See <https://www.uefa.com/returntoplay/news/0275-151c779310c3-b92bbf0d24f9-1000--uefa-approves-final-format-and-access-list-for-its-club-competi/>.

⁵² See fn 45 *ENIC*, para 25.

the true measure of their success. In other words, do they win the league or qualify for the European competitions by placing in the top six? The league or cup, therefore, constitutes a product in itself because of its significance for consumers who will their supported sides onto glory in the form of winning a trophy or avoiding relegation. The prospect of either outcome demands a level of interest from consumers which transcends the results of a mere mid-season game. Therefore, there are two products at play here.

3.5 Market definition

A relevant market needs to be determined for Article 101 TFEU because it gives us a simulated environment in which to measure the anti-competitive effects of certain conduct. A relevant market definition as per decisional practice comprises three components: a product, geographic and temporal market.⁵³ In the context of professional sport, many commentators have grappled with competing theories of how a market should be defined. The fact is that professional sports involve a litany of stakeholders because they flout the typical commercial paradigm of buyer and seller. For example, there are clubs, fans, players, managers, sponsors, football associations, TV companies, shirt manufacturers, etc. The scope of stakeholder is too broad to distil a straightforward supplier-buyer dynamic. With this in mind, I have chosen one of the prominent theories of market definition in professional sport – the Stix-Hackl and Egger classification – which categorises the market into three types. These markets run along a chain from the creation of the components necessary to produce a sporting event right through to the monetization of that event for the organizing stakeholders. I’ve given a high-level outline of this structure below.

At the beginning of this chain, there is the *supply market* where clubs compete for the services of the players – the most fundamental material in the production of football. At this level, players are bought and sold by football clubs attempting to create a squad that maximises their chance of success, i.e. winning football matches. The dynamics at play in the supply market are interesting. While players represent the commodity that is being transacted upon, it is the clubs that act as the buyers and sellers in this market. Whereas clubs ultimately vie for the

⁵³ See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, pp. 5–13.

services of a player and pander to their demands, they also need to negotiate with the selling clubs to ensure that a deal can be done for the player's sale. Downstream from this market is the *contest market* where clubs compete against each other in the form of either a match or a league. The contest market allows us to see how the interdependence of football clubs plays out because the product requires two undertakings to work together to produce an economically viable outcome, i.e. a match. Similarly, the league or competition in which a match takes place in draws its appeal to fans and other stakeholders because it pits teams against each other over a certain period of time, i.e. a season. Therefore, the product in the contest market is two-sided because it encapsulates the individual matches as well as the league/cup competitions. Finally, the *exploitation market* is downstream of the contest market, and it is the stage in which the products of the contest market and supply market are commercialized. For example, the football match between two teams is packaged and sold to TV companies while the jerseys of a new star signing are sold en masse to fans. The parties that profit from exploiting the product at this level include both the individual clubs and National and International associations.

The Stix-Hagl classification is useful as it provides a big picture overview of the various markets which are co-existing in professional football. However, decisional practice from the Commission and CJEU jurisprudence indicates that the relevant market is often refined to capture a particular activity that is under scrutiny.⁵⁴ While this is elaborated on below in section 3.6, there is also a symmetry between the market definition in cases concerning SGBs and the classification of those SGBs as either undertakings or associations of undertakings. That is to say, a SGB might be regarded as an undertaking by way of its form, i.e. how it is legally constituted and operates. However, when referring to that SGB's activities on a given market, its classification can change because the entity is viewed through the prism of its activity and its effects on the market. For example, in *Piau*, the rules of FIFA relating to agent licensing requirements were under challenge, so the relevant market was defined as the market for the provision of services where the buyers are the players and clubs, and the sellers are agents.⁵⁵ This demonstrates that the market definition afforded to a case concerning football varies depending on what the specific issue is in the case.

⁵⁴ Elaborated upon in section 3.5 of this thesis.

⁵⁵ Case C-171/05 Laurent *Piau v Commission* [2005] ECR II-209, para 112.

3.6 Relevant Product market

The relevant product market is the market for provision of organizational services of transnational clubs in football in Europe.⁵⁶ This is a market in which UEFA already exercise exclusive control over as they have coordinated the running of all European club competitions of a significant scale since the inception of the first Champions League in 1955. The case law involving SGBs suggests that the Commission usually settles on a market definition that incorporates at least two types of market from the Stix-Hackl framework. For example, in *MOTOE* and *ISU*, the relevant market was deemed to be not only the organization of sports events but also their commercial exploitation.⁵⁷ While it is clear that the organization and commercial exploitation of a sports competition are functionally separate operations, they are still complementary for the purposes of market definition.⁵⁸ In the *DLG* case, the Court went one step further and considered the relevant market to be just the commercial activities within the market for organization.⁵⁹ What distinguishes these cases from the present case is that UEFA doesn't face a tangible threat from a competing organization *as things stand*. The ESL is a project that may well come to the surface again but at the time of writing, it hasn't amounted to anything more than that. However, in the aforementioned cases, there was an existing alternative organization that was ready to compete with the incumbent organizers. Thus, the focus was more on the restrictions placed on these alternative entities who were already active on the organizational market. On this basis, there is a compelling argument to be made that the relevant market should be restricted to just the organizational market and not include the commercial exploitation market.

In summary, the dominance of UEFA, and consequently the efficacy of a 102 case, can be unpicked when you consider a couple of factors. Firstly, it is outlined above that UEFA doesn't exercise complete power over its decision-making. Their governance model, which allows for the interests of elite clubs to be prioritized, means that it's debatable whether they can exercise enough decisive influence over their activity to be dominant *per se*. Along with this, the

⁵⁶ Pijetlovic page 240.

⁵⁷ Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosioi* [2008] ECLI:EU:C:2008:376 para 33; *ISU* para 104.

⁵⁸ *Ibid* same paragraphs as above.

⁵⁹ Case C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA (DLG)* [1994] ECR I-5641, paras 19 and 48.

existence of potential competitors and the likelihood of their entry is testified to by the ESL which still might come to pass. There is also significant countervailing buying power on the connected market of the supply of clubs' services. In this sense, UEFA is completely reliant on the clubs to continue their participation in competitions such as the UCL because without the clubs there is effectively no competition to market. Taking these factors together, it is easier to understand why an Article 102 case against UEFA would be more difficult to bring forward.

3.7 Connected downstream market: exploitation market

The relevant market established above doesn't necessarily ignore the relevance of the commercial exploitation market, but it only regards this as a connected downstream market. It is a market where sports associations and clubs avail of their commercial rights to profit from the product through advertising, sponsorship, sale of TV rights, club merchandise, and tickets.⁶⁰ Whichever entity controls access to the organizational market will invariably control access to this market. In this case, UEFA, being the sole entity responsible for the organization of transnational football competitions in Europe, possess the rights to decide how their competitions are commercially exploited. Thus, UEFA constitutes the only entity on the supply side of this market.

On the demand side of this market are entities such as sponsors, advertisers, and television/online broadcasters. The objective of these entities is to acquire as many rights as possible to European competitions and consequently convert these rights into profit-making opportunities. The demand of these entities is ultimately driven by the attraction of the competition as perceived by the consumers, i.e. fans. Therefore, there is an interesting synergy between what drives the demand of broadcasting corporations and the levels of demand/interest displayed by the consumers. Seeing as the demand in this market is driven by what the fans want, the substitutability of the product from their perspective is the ultimate factor of importance here.

⁶⁰ Deloitte Sports Business Group 'Bullseye; Football Money League' (January 2019) ,<
<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-uk-deloitte-football-money-league-2019.pdf>>.

3.8 Connected Upstream Market: Clubs services

The further upstream market in the chain is the market for a clubs' services. A football competition and the subsequent exploitation of it can't occur without the input from football clubs supplying the players and team to participate. In this market, clubs sit on the supply side while an organizing body sits on the demand side. Transposing this to the current case, UEFA is the organizing body that represents the demand side of this market and is the "buyer" of clubs' services. This is a mutually beneficial relationship as football clubs ultimately require an organizing body to take on the responsibility of organization. As Pejtitlovic alludes to, there is a strong rationale for one entity monopolizing the demand side of this market.⁶¹

3.9 Agreement or decision capable of affecting trade

Having concluded that UEFA is an 'association of undertakings' for the purposes of Article 101, the next component of such a case is determining whether there is an agreement or decision capable of affecting trade between member states. In this analysis, the relevant agreement or decision refers to the UEFA rule in Article 49 of its Statute which prohibits the creation of an unauthorized breakaway league by any club participating under the auspices of UEFA. Provisions (1) and (3) of Article 49 are the specific clauses that present the issue. Along with these, there are several sanctions which UEFA might apply to any club or member association seeking to create an alternative league that violates Article 49. These include, *inter alia*, a one million euro fine, disqualification from UEFA competitions, and, full or partial stadium closure.⁶² These rules and disciplinary measures form part of a memorandum of understanding which was agreed to by UEFA and the European Club Association (ECA) in 2012.⁶³ The ECA is the representative body mandated to negotiate on behalf of football clubs with UEFA in matters concerning governance. This is capable of affecting trade and has a distinctive cross-border element seeing as European competitions involve teams across the Single Market.

⁶¹ See fn 10, page 246.

⁶² Article 53 of UEFA Statutes.

⁶³ See here for MOA < https://editorial.uefa.com/resources/01fc-0f8427d258d2-c71a6813eabd-1000/memorandum_of_understanding_uefa_fifpro_division_europe_-_2012.pdf > .

3.10 Restriction by object or by effect?

Now that we have established Article 49 as the relevant agreement under scrutiny, we need to evaluate whether it is restrictive. A conventional Article 101 case examines the agreement or decision in question and determines whether it has as its object or effect the restriction of competition. This distinction is important as categorizing it as the former makes it more difficult for an undertaking to justify their action. Restrictions by object generally amount to naked forms of horizontal collusion such as price-fixing, market sharing, or collective boycotting.⁶⁴ The nature of these agreements as so plainly anti-competitive means that no actual analysis of their effects on the market needs to be ascertained. While the significance of the object/effect dichotomy has waned in recent years, it is still relevant in the sporting context because it triggers the application of the *Wouters* criteria.⁶⁵ If an undertaking can't distinguish its agreement from having a restrictive objective, then it can only be saved under the more onerous criterion of Article 101(3).

However, the jurisprudence would seem to accommodate UEFA in this instance as determining whether a rule is restrictive by object requires a Court to pay close regard to the economic and legal context in which it is made and the objectives that it intends to achieve.⁶⁶ In the case of UEFA, the need to safeguard the vitality of their competitions by preventing the creation of competing leagues would seem like a credible objective. This is especially the case when you consider this objective in light of the 'specificity of sport' and the role that UEFA plays in redistributing funds to smaller clubs and grassroots football. Pejtitlovic also makes the interesting point that the Court should grant sporting institutions special leniency in this as well because their regulatory and commercial functions are so "symbiotic" that it would be remiss not to consider the greater context of their role when assessing their rules.⁶⁷ For these reasons, UEFA's Article 49 rule would likely be considered to have as its effects or consequences the restriction of competition.

⁶⁴ Article 10(1) TFEU.

⁶⁵ Fn 54, *Meca Medina* para 31.

⁶⁶ Case C-8/08 *T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343, para 27.

⁶⁷ See fn 10, page 262.

In analysing whether an agreement or decision has restrictive consequences on a market, the Court will look to a counterfactual scenario which hypothesizes what the state of competition would be on the market ‘but for’ the agreement in question.⁶⁸ The effect on competition must therefore be regarded as “appreciable” when viewed through the lens of the counterfactual. In this case, some commentators have surmised that the big clubs would breakaway and create a separate league to maximise profit and guarantee the best product for their consumers.⁶⁹ It can be concluded that Article 49 restricts competition on the relevant market to an appreciable extent because it acts as a significant deterrent to clubs exercising their commercial freedom to form a breakaway league. Adopting the language of Article 101, this could constitute a barrier to entry which has the effect of limiting production, investment, and markets.

3.12 The Meca-Medina test

According to the Court in *Meca-Medina*, the rules of a sporting association under scrutiny for alleged restrictions of competition will never be assessed in the abstract.⁷⁰ That is to say, the rules will be understood in light of the context that they are made which includes considering the legitimate objective that they pursue and whether the consequential restrictions of trade that they produce are inherent and proportionate to the pursuit of that objective.⁷¹ This test is three-pronged and my evaluation of UEFA will involve an examination of each of these prongs. It is important to note that the *Wouters* criteria differ from the justification criteria in Article 101(3) in the sense that the *Wouters* justification means that the conduct itself is not labelled as a restriction of trade as per Article 101. It allows for a ‘rule of reason’ style of analysis where the restrictions on competition are weighed against the imperative of a legitimate objective and the barometers of proportionality and inherency. On the other hand, an exemption under Article 101(3) is more difficult to mount because it comes after the conduct has been determined to be in violation of Article 101(2). The test is also more onerous under Article 101(3) as the

⁶⁸ Case 56/65 *Société La Technique Minière v. Maschinenbau Ulm GmbH* [1966] ECLI:EU:C:1966:38, paras 249–250.

⁶⁹ Stefan Szymanski & Thomas Alfred Hoehn, ‘The Americanization of European Football’ (1999) *Economic Policy* 14(28): 203-240 <

https://www.researchgate.net/publication/4758326_The_Americanization_of_European_Football >.

⁷⁰ See fn 32 - *Meca-Medina*, para 3.

⁷¹ *Ibid* para 42.

undertakings need to demonstrate that the agreement under scrutiny contributes tangibly to “technical or economic progress”.⁷²

3.13 Overall context and legitimate objective

Discerning what UEFA’s objective is in the implementation of Article 49 is not difficult seeing as they have effectively reiterated it in various statements.⁷³ The general tenor of this objective is that UEFA wants to ensure a degree of competitive balance across the competitions that they host which necessitates financial solidarity measures. Without redistribution mechanisms, there is a strong chance that the competitive landscape of football will become too skewed in favour of the biggest clubs which ultimately undermines the meritocracy and integrity of competition – two foundational principles in the European ethos of sport. Furthermore, UEFA has cited the proper organization and governance of European football as another aim of Article 49.

Both the EC and CJEU have commented extensively on what can be considered as legitimate justifications in the sporting context. In *ISU*, the Commission held that the protection of the integrity of the sport, the protection of health and safety, and the organization and proper conduct of competitive sport all may constitute legitimate objectives for a restriction of competition.⁷⁴ The Court further stipulates that horizontal solidarity between participants can also amount to a legitimate objective.⁷⁵ This is precisely how UEFA could justify Article 49 seeing as the solidarity mechanisms inherent in their governance model are necessary for football to fulfil a socio-cultural function. Solidarity ensures that finance trickles all the way down to the amateur and grassroots game and provides the outlet for social development that

⁷² “... which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit...” Article 101(3) TFEU.

⁷³ UEFA Statement on club football, 15 December 2000 < <http://kassiesa.home.xs4all.nl/bert/uefa/news/001215.html> >.

⁷⁴ *International Skating Unions Eligibility Rules* (Case AT.40208) Commission Decision 2018/C148/06 [2018] OJ L148/9, para 211-214.

⁷⁵ *Ibid* para 222.

sport is envisaged to have in Europe. In fact, UEFA has already relied on this argument and been given support by the Commission in the Joint Selling of commercial rights case.⁷⁶

While the solidarity mechanisms have a compelling narrative and seem intrinsically linked to the Article 165 TFEU notion of sport and society, the other legitimate justification is less straightforward to substantiate. In theory, nothing is preventing an alternative association from governing and regulating European football in a manner akin to UEFA. The ESL was intended to operate alongside the UEFA competitions which reinforces that two competitions can co-exist. However, the division of teams across two competitions would ultimately hamper the quality of the product being offered. Football fans want to see the best clubs play each other at the latter stages of every competition to determine who is the best. This is why the UCL is so successful because it is the only forum for the best clubs in Europe to compete for glory. The pyramidal model that UEFA oversee is generally accepted as the most efficient and effective of organizing sport in Europe.⁷⁷ Without a structure like this, there is a greater likelihood of conflict between competing organizers on issues like scheduling, rules, and responsibilities which ultimately damages the value of the product. On foot of this reasoning, it can be considered as a legitimate objective by UEFA.

3.14 Inherency

The inherency and proportionality requirements are considered in light of the legitimate objectives that an undertaking cites for its conduct. Inherency speaks to a kind of necessity such that without the measures, and their restrictive effects, the legitimate objectives sought simply could not be achieved. This almost mirrors the indispensability requirement in Article 101(3) but the Court in *Wouters* steered away from this conclusion by stating that the measure selected did not need to be an “absolute necessity”.⁷⁸ In fact, the Court emphasized that so long as the action taken by the undertaking could ‘reasonably be considered to be necessary’ to

⁷⁶ *Joint selling of the media rights to the German Bundesliga* (Case 37214) Commission Decision [2005] OJ 2005 L 134/46; *Joint selling of the media rights to the FA Premier League* (Case COMP/38.173) [2016] Commission Decision [2008] OJ C 7.

⁷⁷ See fn 41.

⁷⁸ Richard Whish & David Bailey, *Competition Law*, (OUP 2018) chapter 3, part (vi)(c).

ensure that the objective is attained then this will suffice.⁷⁹ As Pejtitlovic notes, this grants significant discretion to the SGBs to choose the form/means to achieve a legitimate objective.⁸⁰

In this context, we need to examine UEFA's Article 49 for whether it is inherent in the attainment of the earlier stated goals of (1) the organization and proper conduct of competitions and (2) developing football with solidarity systems. Regarding the first goal, we need to examine this in the context that European football operates with its current pyramidal model. That is, having one federation (UEFA) organizing the competitions from the top-down with a harmonious and cooperative dynamic with the other stakeholders. If we assume that this is the best model, then Article 49 can be understood as being inherent in the pursuit of the objectives that UEFA is pursuing. In the current structure, curtailing the formation of a breakaway league is necessary to ensure that UEFA can adequately organize and govern the football calendar each season. Additionally, ensuring the effectiveness of a solidarity mechanism would be impossible if the threat of a breakaway league from the major clubs was to materialize. Moreover, the EC and CJEU have repeatedly stressed that sport should be self-regulated within the EU and so long as it operates within the parameters of the treaty then a SGB should be free to choose the system of governance best suited.⁸¹ Seeing as UEFA has this autonomy, then Article 49 can legitimately be considered as inherent in the pursuit of its objectives in the organization of football and operation of solidarity.

Some commentators have suggested that Article 49 could fall on the inherency requirement because it can't be assumed that a potential breakaway league would clash with the organization of European football by UEFA.⁸² While this is plausible in theory, the ESL schedule was for midweek games on a pan-European basis between the competing clubs which would have meant that they could not compete in the UCL or Europa League. Even assuming that the National football associations would have permitted the clubs to continue playing in their domestic leagues, it is clear that the ESL would have meddled with UEFA's objective of

⁷⁹ Wouters para 107.

⁸⁰ Pejtitlovic page 278.

⁸¹ Opinion of Advocate General in Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, para 87. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 'Developing the European Dimension in Sport' COM(2011) 12 final, 18. 1. 2011, para 4.1.

⁸² Robby Houben, Jan Blockx & Steve Nuyts 'UEFA and the Super League: who is calling who a cartel?' (2022) *The International Sports Law Journal* <<https://link.springer.com/article/10.1007/s40318-021-00201-2>>.

organizing the sport. To adopt the view that the ESL could co-exist alongside the pre-existing European structure of football would require an incredibly limited and procedural understanding of UEFA's role in the organization of sport. As stated earlier, UEFA is mandated with a role in organizing sport that goes beyond just scheduling games. It is also responsible for fostering the development of the game at all levels (professional and amateur) whilst ensuring that the right systems are in place for pursuing the socio-economic goals of football as well.⁸³

3.15 Proportionality

The proportionality requirement is essentially asking whether there are alternative, less restrictive means of achieving the same objective. This counterfactual scenario must be demonstrated to be less restrictive rather than merely a substitute. This represents a slightly trickier barrier for UEFA to hurdle seeing as the Court found similar measures to be disproportionate to objectives in *ISU*. In that case, the GC cited 'the absence of objective, transparent, non-discriminatory and verifiable authorization criteria' and the wide margin of discretion that the sporting association had as reasons for finding that their restriction was disproportionate.⁸⁴ Article 49(3) confers precisely the same kind of far-reaching discretion to UEFA to authorise or prohibit a proposal for an alternative competition. The absence of any criteria within the UEFA statutes that might indicate how UEFA makes this decision is also a concern.

However, it must be noted that Pijetlovic does include conditions in her book that are allegedly the authorization criteria of UEFA in sanctioning or permitting cross-border competitions. They come from a meeting between UEFA management and the UEFA Member Association General Secretaries in 2005. It's unclear whether these currently represent the UEFA stance but they are only conditions we have to work off. They are the following:

- (1) Pre-authorization by the respective UEFA member associations;

⁸³ UEFA, Vision Europe: the direction and development of European football over the next decade (2005) <<https://www.uefa.com/newsfiles/374875.pdf>>.

⁸⁴ ISU para 118.

- (2) The cross-border competition must be organized by the respective UEFA member associations;
- (3) All clubs participating must be affiliated to a UEFA member association;
- (4) The geographical aspect should be taken into account;
- (5) All participating clubs must recognize, as a condition precedent, that the ownership of the competition and its core commercial rights belong centrally to the competition organizer;
- (6) Minimum standards should be set out regarding solidarity distributions from the commercial rights revenues;
- (7) Competition regulations must be in compliance with the UEFA Statutes and need to be approved by UEFA;
- (8) Participating clubs must be licensed in accordance with the UEFA club licensing system;
- (9) Competition regulations must include, among others, provisions concerning refereeing, disciplinary matters, integrity of competition, anti-doping;
- (10) The cross-border competition cannot conflict with the international match calendar;
- (11) Matches cannot conflict with UEFA club competitions;
- (12) Cross-border competition must not replace the national championships and must be arranged around the calendar of the national championship; and
- (13) Approval by FIFA

Assuming that these criteria are legitimately the requirements for UEFA to sanction a breakaway league then they are sufficient to be analysed. The Court's jurisprudence in *ISU*, *Motoe* and *Fédération Internationale d'Automobile (FIA)* suggests that the principle of proportionality is held to a high standard.⁸⁵ In all three cases, the EC and CJEU found that the sporting associations had implemented measures precluding the formation of a breakaway structure in a patently disproportionate manner. The measures employed were deemed to serve a purely commercial goal and preserve a monopoly grip on the revenue generated in the

⁸⁵Case T-385/07 *Fédération Internationale de Football Association (FIFA) v. Commission* [2011] ECLI:EU:T:2012:42, Case C-49/07 *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* ECLI:EU:C:2008:376; Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163—Notification of FIA Regulations, COMP/36.638—Notification by FIA/FOA of agreements relating to the FIA Formula One World Championship, COMP/36.776—GTR/FIA and others (2001/C 169/03).

respective sports. This implied that the Court and Commission handled breakaway restrictions based solely on the nature of the interests being safeguarded.⁸⁶ As mentioned above, Article 49 is designed to protect the structure of European football as it currently stands. This structure enables UEFA to fulfil its important mandate of growing the game and ensuring that its development is sustainable over time. This is accepted as a legitimate objective and interest by the court in previous cases featuring UEFA and therefore allows their case to be distinguished from the cases above in which the SGB didn't have such a broad role in the growth of their sport.

However, some of the conditions above raise doubts as to whether they would survive a Commission's proportionality assessment. For example, conditions 2, 3, and 5 are an expedient inclusion by UEFA because they effectively secure it with the authority to organize and govern any potential breakaway league by requiring the fleeing clubs to transfer ownership rights of such a league to national associations. As a breakaway league such as the ESL will inevitably have a pan-European character, then this means that the national associations will simply transfer the responsibility of organization to UEFA. The logic behind transferring power is that private promoters are somehow nefarious for the development of football. If they were left to organize and commercialize a breakaway league, then it might hinder investment in the game and ultimately damage football. However, there is nothing to suggest that this will be the case and if anything, there are a litany of examples in the football world today that undermine such an inference. For example, the English Football Association (hereinafter "FA") has a broad regulatory ambit of football in the UK, overseeing the organization of many professional divisions. However, the FA delegates the responsibility to organize and commercialize the Premier League to all of the participating clubs.⁸⁷ While the clubs have significant autonomy in deciding how to monetize the many opportunities that are presented to them, they are still bound to the solidarity mechanisms that the FA determines. This strikes a balance between extending sufficient commercial autonomy to clubs whilst ensuring that finances are redistributed vertically and horizontally. There is a similar football association/separate league entity dynamic at play in Italy and Spain. This demonstrates that conditions 2, 3, and 5 would

⁸⁶ Pijetlovic page 277.

⁸⁷<https://www.premierleague.com/about#:~:text=The%20Premier%20League%20is%20a,to%20English%20and%20European%20law>.

be disproportionate seeing as Football Associations across Europe already act as co-owners or principal/agents rather than exclusive owners of the commercial rights to a competition. Assuming the breakaway league meets the other conditions on scheduling, authorization, and rules such that the integrity of cross-border football is not compromised in the way envisaged by Advocate General Kokott⁸⁸ then is this not viable and less restrictive?

Two relevant cases from the UK give an indication as to how other jurisdictions view the proportionality dilemma. *Greig v Insole* and *Hendry v WPBSA* both concerned the proportionality of restrictions and sanctions placed on athletes in cricket and snooker who had signed up to play for unauthorized breakaway leagues.⁸⁹ The English High Court acknowledged that the SGBs concerned pursued legitimate objectives in seeking to protect the organization and public interest of their sports. The argument relied upon by the federations to support this was that private promoters targeted commercial exploitation rather than overall sport development. The breakaway leagues enabled them to avail of the benefits of player development invested in by the incumbent federations without contributing to that investment themselves. In both instances, the federations opted for draconian “ISU-style” bans on athlete participation which was particularly egregious in the *Greig* case because, by the time the bans were issued, no player had actually taken part in the proposed “Cricket World Series”. Interestingly, the current scandal concerning the LIV Golf tour, a Saudi-backed project spearheaded by Greg Norman, has some parallels to these cases. Whereas the incumbent federations in the cases of *Greig* and *Hendry* sought to pre-empt the establishment of a breakaway league by prospectively banning players, the PGA Tour learned from that mistake and waited until the LIV players participated in one of the breakaway events before banning them.⁹⁰

What these cases, as well as the *ISU* decision, reflect is that the severity of the penalty imposed by the incumbent SGB is a pivotal consideration for the EC and CJEU in determining whether such a restriction is proportionate to the aim sought. Following the ESL announcement, UEFA moved to ban all of the participating clubs from UEFA competitions and impose fines for

⁸⁸ Opinion of AG Kokott in C-49/07 MOTOE, para 92.

⁸⁹ *Greig v Insole* [1978] 1 WLR 302 (CH D 1977); *Hendry and others v WPBSA* [2001] All ER (D) 71.

⁹⁰ Elliot Heath, ‘PGA Tour Bans All LIV Golf Invitational Series Players’ (*Golf Monthly*, 9 June 2022) <<https://www.golfmonthly.com/news/pga-tour-bans-all-liv-golf-invitational-series-players>>.

violating the UEFA statutes. This bright-line prohibition would seem to align with the heavy-handed sanctions of the Skating Association in *ISU* and the SGBs in *Greig* and *Hendry* in being too harsh and likely disproportionate. However, at this juncture, it is important to distinguish these cases based on the fact that they concern individual sports, rather than team sports. Moreover, the scale of European football financially means that there is considerably more interest at stake for UEFA rather than the other SGBs in skating, cricket, and snooker. Seeing as the threat posed is more pressing, comparing the proportionality of the actions of UEFA with the other SGBs is an unfair assessment. This author would submit that UEFA should have wider discretion (and consequently a less onerous proportionality assessment) than possibly any other SGB in Europe to protect their objectives. With that being said, the fact that UEFA's most recent affirmation on the breakaway guidelines is from 2005 and leaves a lot to be desired from a proportionality point of view, it is unlikely that they would stand up against assessment from the Commission or CJEU.

IV: COMPETITIVE BALANCE AND US SPORTS

4.1 Introduction

As acknowledged in section 1.1 of this thesis, the competitive balance of European football has been subverted with the financialization of the game since *circa* the late 1990s. This forms the riposte of some to the insinuation that the ESL will be catastrophic for the meritocracy of football. In this chapter, I will be deviating from the legal assessment of UEFA to consider the more normative issue of competitive balance and whether this is an attainable, or even desirable, ideal for the game. Seeing as the ESL represents the most plausible counterfactual to the present UEFA system, I will be using this as a relevant example of how a closed, US-style league might be ultimately better and pro-competitive if managed currently. The purpose of this is not for me to advocate for the ESL over UEFA. Rather, I'd like to present some commentary on how some of the systemic issues within the game could be addressed by adopting some of the solidarity and collective bargaining mechanisms in the US. On the other hand, I will demonstrate how some aspects of competitive balance are incompatible with the European model of Sport and hence should be avoided.

Of course, there are two pressing caveats to mention. Evaluating competitive balance involves some economic theory and analysis. I am not an economist, nor do I purport to be capable of running sophisticated economic analyses. This comparison will rely on basic economic theory to substantiate further conclusions about the pro/anti-competitiveness of competitive balance mechanisms. Moreover, I understand that there is more nuance between how the ESL would operate and how the current professional leagues in the US operate. However, the comparison is still relevant as US sports offer the most prevalent and documented perspective of closed leagues where the rationale for market actors is definitively profit-driven rather than utility-maximizing.

4.2 US Model of Sport vs European Model of Sport

The differences between these respective models of sport are generally quite evident. They can be simplified as follows:⁹¹

- (1) Pyramid model
- (2) Professional/amateur dichotomy
- (3) Legal status of clubs
- (4) System of promotion and relegation/league structure
- (5) Utility vs profit-maximizing.

A key element of the European Model of Sport is the pyramidal structure that has been touched upon earlier. This system of governance uses the one-federation-per-sport idea which places one SGB at the top of a hierarchical structure assuming the ultimate responsibility for the organization and governance of that sport. In the US, there is no symmetry between the organization of professional and amateur sport. The professional leagues of American football, basketball, ice hockey and baseball operate as pseudo joint ventures while amateur sport usually takes place at the collegiate level and is regulated by the NCAA. The professional leagues of the aforementioned US sports are closed or hermetic in style. In other words, there is no system for promotion and relegation. This is antithetical to the ethos of European sport which is largely characterised by promotion and relegation between divisions.

Moreover, European sport has a defined national/continental dichotomy where teams compete in multiple leagues and competitions each season. Finally, European clubs also have to release players for National competitions which form a far more prominent feature of European sport than in the US. With all that being said, European sport still has a strong socio-economic and cultural tie. This is due to the nature in which European sports evolved with strong emphasis on local and parochial ties forming the backbone of sporting clubs and their competitions. For many, the process of self-identification orientates around a particular team or sport.⁹²

⁹¹ 'Professional Sport in the Internal Market, project no. IP/A/IMCO/ST/2005-004, Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament (September 2005) at page 28.

⁹² See fn 2, page 10.

4.3 Competitive balance

In the context of a discussion on the collective selling of TV rights by Premier League football clubs in the UK, the Commissioner for EU Competition at the time, Karol Van Miert, said the following:

“Special features of the sporting world place restrictions on the production and organization of sporting events which would be inadmissible in other sectors of the economy... if the spectator is to enjoy an interesting and high-quality event, the outcome of the competition must be uncertain. For this reason, there must be a balance of strength between the opponents... since the interests of the various clubs are intertwined, the market is intrinsically unstable whenever there is a financial imbalance between the clubs. This imbalance must therefore be corrected...”⁹³

The insinuation of these comments is that the EC was concerned with competitive balance as a goal of their policy on European football. This is also spoken to by the comments of the CJEU in *Bosman*.⁹⁴ However, it is not explicitly clear in the governance activities of UEFA or national federations that competitive balance is a point of policy.⁹⁵ After all what exactly is “competitive balance”, and does it represent a desirable outcome or merely a fantasy notion? Competitive balance refers to the balance between sporting capabilities – the more balanced the teams, the more uncertain the outcome of each match which is consequently more appealing for fans.⁹⁶ Aside from the institutional and organizational differences between US and European sport, they can also be distinguished in their quest for competitive balance. In the US, this is particularly evident where the main mechanism for achieving competitive balance is the “rookie draft” system which allocates players from college sports to the professional franchises of the NFL, NBA, NHL, and MLB. Generally, the worst-performing teams from the previous

⁹³ Karel Van Miert, Speech to the European Sport Forum, 27th November 1997 < http://europa.eu.int:80/en/comm/dg10/sport/nl/b_news5.html >.

⁹⁴ “In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.” Para 106 of *Bosman*.

⁹⁵ See fn 90 at page 92.

⁹⁶ Jonathan Michie & Christine Oughton, ‘Competitive balance in football: trends and effects’ (2004) Football Governance Research Centre < <https://research.birmingham.ac.uk/en/publications/competitive-balance-in-football-trends-and-effects> >.

season get allocated the first picks in the draft. This reverse order of selection is in theory designed to give the poorer performing teams a better chance in the upcoming season.

The draft system in the US is not apparent in any European sport. This is due to the structural differences within European sport where there is no clearly defined pathway from Highschool to University, and University to the professional sport. The pathway of most players into the professional games of European Sport is far more varied with players getting “poached” from early ages into club academies or national “centres’ of excellence” or plying their trade in amateur leagues before rising the ranks into professionalism. As the path is not so linear, implementing a draft system would not be possible. In addition, European football is cross-border by nature thus coordinating a draft system whereby players from a University or High School in one country would move to the professional club of another country is out of touch with many points. Firstly, there are significant cultural, linguistic, and logistic difficulties that make this an unattractive prospect. Moreover, the national aspect of European sport means that national federations have little incentives to agree to a talent distribution system which sees their most promising talents being sent abroad to play in foreign countries (and potentially stifle their development which is to the detriment of the national team).

Another mechanism for solidarity/redistribution in the US is through the sharing of national broadcast revenues. In other words, contrary to European sports, US leagues are permitted to collective selling agreements from the Federal Trade Commission which the leagues can organize. With the agreements, each team receives an approximately similar amount from the TV deal. In Europe, TV deals are often negotiated collectively. However, the amount that each team receives is pegged to their performance in domestic competitions as well as having a fixed minimum share.⁹⁷ The effect of this is that the best-performing teams have their competitive advantage perpetuated because they receive a greater share of income each year.⁹⁸ Similarly, the trend of gate-sharing agreements in the US has not been reflected in European football where the home team keeps almost all the revenue. Thus, we can conclude that the

⁹⁷ Troels Troelson & Trudo Dejonghe, ‘The need for competitive balance in European professional soccer: A lesson to be learned from the North American professional leagues’ (2006) Atiner; Piraeus, page 6 < https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1666393&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&fromSitemap=1 >.

⁹⁸ Ibid page 6.

infrastructure for financial redistribution in the US is far more thorough as the emphasis on competitive balance is stronger. The inference to draw from this is that the European system could learn some lessons from the US. However, there is more than meets the eye here.

4.4 Plugging competitive balance into the European Model of Sport

Firstly, the modelling of league structures rests on several assumptions about the motivations of teams and the cause-and-effect relationship between club investment and success. One of these assumptions is that increased investment leads to better performance which leads to higher revenues. Increased levels of performance lead to higher revenues because fans are attracted to success as much as notions of fealty. The data underlying these assumptions is not disputed. A quick glance at the trend of fan numbers for successful clubs in the UK tells you that the more success you have as a club, the more fans that club gains.⁹⁹ Revenue is also determined by the commercial drawing power of each club which depends on a team's location, history and reputation, and so on. The attractiveness of the league in turn depends on the competitive balance of that league with higher levels of competitive balance being supposedly better for a league's overall pulling power.¹⁰⁰ This presupposes that there is a demand for competitive balance. If this is the case, then each team would act in a strategically complementary way. In other words, it would be in the interests of all teams to be evenly matched because this produces a more economically lucrative outcome for both.¹⁰¹

Supposing that there is also a revenue-sharing mechanism in operation in a league where each club has to share its revenues among rivals. Assuming that each team has equal drawing power (which is the ultimate goal of competitive balance) then revenue sharing won't correct competitive balance, rather it will just discourage investment and ultimately harm product quality. This is part of the wider idea that sharing the spoils of victory negatively impacts the incentive to win. In this sense, revenue sharing can actually be used as a way of internalizing the negative impacts of competition, i.e. externalities. The reason being is that when revenue

⁹⁹ Dean Jones, 'Can Manchester City's success ever lead to global domination?' (*Bleacher Report*, 4 October 2018) < [¹⁰⁰ See fn 95 page 1.](https://bleacherreport.com/articles/2792299-can-manchester-citys-success-ever-lead-to-global-domination#:~:text=The%20club%20is%20on%20the,2008%20to%20116%20this%20season.> .</p></div><div data-bbox=)

¹⁰¹ See fn 68 page 25.

is shared, clubs want to compete in a way that maximises total return for both clubs. This is because they understand competitive balance as being the ultimate ideal. However, this is still a market failure because it results in falling investment, reduced quality, and harm to consumer welfare. Sharing is a tax on winning.¹⁰²

If this is the theoretical assessment, then how do US leagues operate with high levels of competitive balance and investment concurrently? The unionization of team sports in the US has acted as a constraining factor on the possibility of one team achieving unparalleled dominance, e.g., the salary caps in place in the NFL, NBA, NHL, and MLB. However, this trend is far less common in Europe and partly explains the competitive imbalance at present in European football. One of the reasons for this is that European football is structured in such a way that clubs participate in multiple competitions, organized along an unenumerated scale of importance. The UCL sits on top as it constitutes the most financially lucrative and desirable competition to compete in and win. In the context of pan-European leagues, the Europa League and the Conference League sit below. However, there are also the national leagues and cups to consider. Take the UK as an example – Liverpool competes in the Premier League, the League Cup, and the FA cup domestically. Assuming they qualify for the UCL/any other European competition then this makes them eligible to play in four competitions annually. Revenue generation is greater in the UCL for a litany of reasons and as such, the investment by the UCL teams will grow. While this maintains competitive balance in the UCL such that PSG will keep up with Bayern Munich, Real Madrid, and Manchester United – it distorts competitive balance domestically.

What this means is that assuming competitive balance is the goal then the status quo structure of European football is undermining the achievement of this goal. The teams which traditionally never qualify for Europe will have their profitability driven towards zero. Moreover, the financial incentive of the UCL teams to compete in domestic competitions is reduced if the profitability of the league is being dwarfed by the prospects of revenue earning in Europe. Thus, competing in the domestic competition comes under question for the European super clubs. The conclusion drawn from this surface-level economics is that a single

¹⁰² Ibid page 28.

league, closed competition for the top European clubs is the only plausible means to achieve competitive balance that is relatively close to equilibrium.¹⁰³

I discuss all of this for the reason that it places the competitive regulation of European football in a paradoxical position. As we've alluded to, a degree of competitive balance is a goal of EU competition law (but not explicitly of EU sports policy). In other words, competition law strives to create as level a playing field as possible for competitors to operate so that there are no inherent advantages that incumbents can leverage to the disadvantage of other competitors. However, this paradigm of competition, and the strive for competitive balance, can't be replicated in European football in its current guise. This is because of the reasons outlined above. Firstly, the open nature of domestic competition reduces the incentives for clubs to engage in adequate revenue-sharing solidarity schemes. Secondly, the existence of a hierarchical structure of leagues means that clubs are less motivated to sue for competitive balance domestically. Finally, the dearth of correcting mechanisms such as player unionisation means that clubs are financially unfettered. On this basis, the goal of competitive balance is something that can't be squared with how football currently operates in Europe. The current framework is bound to create competitive imbalance and with the rapid financialization of the game continuing to happen then it is likely that this imbalance will only be exacerbated.

4.5 Solutions

The authors of the paper which provided me with this research suggest that in the pursuit of competitive balance the only solution is for the top UCL clubs to withdraw from domestic competitions and commit to playing in a pan-European super league, i.e. the ESL.¹⁰⁴ This divergence between National and European competition will mean that competitive balance will be easier to instil in both competitions. However, the success of this is likely to hinge on the transformation to a closed-league system which is a significant affront to the notions of sporting meritocracy that the EU seeks to protect. Is there anything that can be done to reconcile these challenges? For the purposes of brevity, I will focus on just one suggestion in the

¹⁰³ See fn 68 page 41.

¹⁰⁴ See fn 68 page 41.

following paragraph but there is a burgeoning field of research that delves into ideas about how to correct the endemic competitive imbalance in European football today.¹⁰⁵

Thus far, UEFA has attempted to use its system of solidarity redistribution to ensure that there is a degree of financial parity between clubs. While this system has ensured that the geographical scope of the game has grown, as well as the funding for women's and grassroots football, it has done little to prevent the top clubs from preserving their dominance in the UCL. One mechanism that could be borrowed from the US is the usage of salary caps in regulating the amount that clubs can pay their players. Of course, the objections to this are obvious. Firstly, a salary cap seems to constitute a restriction on trade. Secondly, a salary cap might also contravene an individual's freedom to provide services. However, we know from our analysis of *Bosman* and *Meca-Medina* that such restrictions may nonetheless be deemed compatible with competition law if they satisfy the *Wouters* criteria. In the context of football today, where player wages have surged to dizzying levels, it could be argued that salary caps are justified on the basis that they preserve the economic viability of teams competing in the UCL and other competitions.¹⁰⁶ FC Barcelona is a testament to the fact that many major European clubs are incapable of keeping pace with the wages demanded from players.¹⁰⁷ While the malleability of UEFA's Financial Fair Play scheme has allowed such clubs to get away with being financially reckless, the result has hardly been positive. Players continue to demand higher wages and further distort the balance in the market as only a few clubs have the means and political leverage to afford to bend the rules to sign them.

While it is straightforward to argue that maintaining the economic viability of football clubs is a legitimate objective, the question is whether the restriction of a salary cap is inherent and proportionate to that objective. With respect to inherency, the jurisprudence of the CJEU in

¹⁰⁵ Pages 81-95 of this document detail these extensively - 'Professional Sport in the Internal Market, project no. IP/A/IMCO/ST/2005-004, Commissioned by the Committee on the Internal Market and Consumer Protection of the European Parliament (September 2005).

¹⁰⁶ With respect to wage levels, see these articles; Kendon Carrera, 'Why are footballers paid so much' (*SQAF*, 2021/2022) < <https://sqaf.club/why-are-footballers-paid-so-much/> > accessed 28 June 2022; Rachel Scarfe, Carl Singleton & Paul Telemo, 'Extreme wages, performance and superstars in a market for footballers' (2020) *Industrial Relations: A Journal of Economy and Society* < <http://www.reading.ac.uk/web/files/economics/emdp202004.pdf> >.

¹⁰⁷ Saul Escudero, 'Report: Barcelona desperately needing liquidity as they can't pay their players' (*FanNation* 17 May 2022) < <https://www.si.com/soccer/manchesterunited/news/rprt-barcelona-desperately-needing-liquidity-as-they-cant-pay-their-players-manchester-united-could-solve-the-problem-by-buying-frenkie-de-jong> >.

Meca-Medina and *Deliège* suggests that this condition is not heavily scrutinized.¹⁰⁸ Similarly, as alluded to in sections 3.12-3.14, the Court and Commission have left sporting federations with significant autonomy to choose the organizational structure of their sport that they deem to fit best.¹⁰⁹ On this basis, salary caps could pass the inherency hurdle if UEFA could demonstrate that they were a crucial factor in preserving the financial viability of clubs. A recent analysis of the expenditure of football clubs in the Premier League indicates that players' and coaches' salaries represent the biggest outlay for football clubs.¹¹⁰ It is therefore credible to argue that curbing the extortionate salaries paid to players and coaches is an *inherent* restriction in the pursuit of maintaining the economic viability of clubs. Concerning proportionality, a comparison should be made to the MLS to discern that salary caps are an effective yet proportionate restriction. In the MLS salary caps are agreed upon through collective bargaining agreements.¹¹¹ They set the ceiling and floor on how much players can get paid as well as setting the total budget that teams can spend on salaries. This process is effective for two reasons. Firstly, it still permits clubs quite a bit of discretion in deciding how to spend their allocated budget. Secondly, the salary caps are subject to frequent collective bargaining agreements which enables them to be adjusted in line with inflation or other prevalent issues.¹¹²

The evidence from the MLS is that salary caps can be deployed effectively and with minimized impact on competition. However, their implementation relies on using collective bargaining agreements – a common feature of US sports but one that is still in its infancy in Europe.¹¹³ In turn, collective bargaining relies on effective social dialogue between the various stakeholders which is a recommendation that has been made to the EU in previous reports.¹¹⁴ The TFEU obliges the Commission to take an active role in the promotion of social dialogue concerning

¹⁰⁸ *Meca-Medina* para 44; Joined Cases C-51/96 and C-191/97 *Deliège* [2001] ECR I-2549 para 64.

¹⁰⁹ White Paper on Sport, para 4.

¹¹⁰ Yavuzhan Yilancioglu, 'The business of football – breaking down the finances of a football club' (*Data Driven Investor*, 12 April 2021) < <https://medium.datadriveninvestor.com/the-business-of-football-breaking-down-the-finances-of-a-football-club-8263614059d8> >.

¹¹¹ Rachel Scarfe, Carl Singleton & Paul Telemo, 'Extreme wages, performance and superstars in a market for footballers' (2020) *Industrial Relations: A Journal of Economy and Society* < <http://www.reading.ac.uk/web/files/economics/emdp202004.pdf> >.

¹¹² *Ibid* 95.

¹¹³ Pejtitlovic, page 82.

¹¹⁴ See fn 1 page 87.

a raft of labour issues set out in Article 153(1).¹¹⁵ The EU can only do so much in this respect as it still requires all of the relevant stakeholders to coordinate. While the Arnaut Report identified and categorized the stakeholders involved in European football, it is the composition within these stakeholder groups that is problematic.¹¹⁶ Take the ECA as an example - it is one of the most prominent voices in any stakeholder dialogue in European football. The ECA was established by the former G14 clubs when they agreed to disband. The membership scope of the ECA is admittedly broader but in practice, it operates in an almost identical fashion to the G14. As Pejtitlovic eloquently puts it, “the broad membership is just a smoke screen to provide legitimacy to the ECA decisions and portray them as decisions of an all-representative body”.¹¹⁷ The limited examples of collective bargaining agreements in European football confirm that there isn’t effective representation of the smaller clubs, allowing the elite clubs of the ECA to manipulate the process and further entrench policy moves that cement their power. Hence, the efficacy of mechanisms such as a salary cap hinges on whether the Social Dialogue process can be reconfigured properly so that participation of smaller clubs is given more weight. This is not the case as things stand but there is nothing to suggest that this is an unattainable goal. Although it is not the purpose of this thesis, hypothesizing about how to repurpose Social Dialogue in the context of European football would be interesting for future research.

¹¹⁵ Article 153(1) TFEU: “With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields:(a) improvement in particular of the working environment to protect workers' health and safety; (b) working conditions; (c) social security and social protection of workers; (d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5; (g) conditions of employment for third-country nationals legally residing in Union territory; (h) the integration of persons excluded from the labour market, without prejudice to Article 166; (i) equality between men and women with regard to labour market opportunities and treatment at work; (j) the combating of social exclusion; (k) the modernisation of social protection systems without prejudice to point (c).”

¹¹⁶ Independent European Sports Review (2006), ‘Arnaut report’, Jose Luis Arnaut.

¹¹⁷ Pejtitlovic, page 79.

V: CONCLUSION

We have seen that the relationship between EU law and the professional world of sports has evolved quite significantly since the seminal ruling in *Walrave*. Even before this case, the orbits of professional sports and EU law existed independently of each other. However, the expansion of the EU and its legal mandate coincided with the growing financialization and professionalization of several sports which made a collision inevitable. From that point, the jurisprudence and policy trends of the EU would strongly suggest that their influence is growing in this regard. As alluded to in section II, certain SGBs were expedient in how they formed ties with the various EU institutions. The Europeanization of sports such as football has also inadvertently aided the EU project of integration, and this is a point that could be explored in far greater detail than the short introduction I afforded it in section II.

The sporting exception carved out in *Walrave* was gradually eroded with the ruling in *Bosman* until it was severely undermined in *Meca-Medina*. As it stands, any rule implemented by a professional sporting association is capable of being scrutinized under EU law on the basis that it constitutes an economic activity. As demonstrated by the facts in *Meca-Medina*, this is quite a broad ambit for EU law to intervene seeing as rules that don't seem *prima facie* economic can be related back to some economic effect quite easily. Interestingly, the scrutiny of EU law didn't materialize to be such a catastrophic blow for SGBs. While there was a litany of cases that exposed SGB rules which patently violated EU law, these were largely reformulated and brought in line with the law rather than completely abolished. This sleight of hand has enabled sporting federations to preserve a lot of the autonomy that they previously had.

In the conclusion of this thesis, I will explicitly set out an answer to the research question by addressing the sub-questions formulated. To answer the first sub-question, I employed a distinctly descriptive analysis by laying out the rough chronology of case law and legislative/policy interventions that the EU made in the area of sports. While the case law tells quite a coherent story of how the relationship between EU law and sport developed, the policy documents give a greater insight into the thinking of the EU regarding the role of sport. It is apparent from various commissioned reports that the EU perceives sport to be an imperative feature in the life of an EU citizen. This is either through its role in fostering a stronger sense of community and locality, being a means for EU citizens to remain physically active and fit,

providing a starting point for identity formation, harbouring better socio-cultural development, etc. The recognition of sport in fulfilling the aforementioned purposes permeates throughout the numerous publications of the EU. The greater recognition that sport received for its importance in European society meant that this was also something which needed to be protected and harnessed. As such, the EU began to carve out greater influence in the governance and regulation of sport at the professional level which could reverberate down the traditional pyramid models that most European sports followed.

While the extent of this influence is best captured with the Treaty reference to sport at Article 165 TFEU, I also analyse whether this development had the impact that it was designed to have. To elucidate this, I referred to commentary which discusses how the growing cooperation between the EU and sporting federations became a tool for some federations to subtly manipulate this closeness to their advantage. SGBs such as UEFA began to resemble an EU institution in how they operated as they became increasingly bureaucratic. The creation of endless “executive boards” and councils in UEFA meant that the way in which professional football in Europe was governed and run seemed to be removed, or detached from the stakeholders who ultimately kept the game alive, i.e. the fans. Some of this commentary also detailed how UEFA has become a strong lobbying presence to the EU institutions and this is a trend which I believe is concerning. Not only are the optics of this “cooperation” negative, but the product of them also contributes to a growing politicization of UEFA and football more broadly. Admittedly, these are normative considerations and aren’t the focus of this thesis. However, they remain important considerations in the subsequent sections of this thesis.

The second sub-question directly addresses the evaluative first part of the research question. It involves simulating a competition law case taken by the European Commission against UEFA on foot of their restriction on breakaway leagues. To flesh out this simulation, I needed to consider the relevant aspects of such a case like the classification of UEFA as an undertaking, a relevant market definition, and what type of restriction Article 49 constitutes. I will summarize my conclusions on these aspects. The relevant product market is the market for provision of organizational services of transnational club in football in Europe. In determining this, I considered the Stix-Hagl classification which helpfully distils the market structure for professional sport into three separate yet connected markets. Establishing this market definition was necessary to also consider the classification of UEFA. As I concluded that Article 101 was the more sensible competition Article to bring a case under, I classified UEFA as an association

of undertakings. Article 49, being a part of the UEFA Statutes, was agreed upon by the member national associations and delegated power to the UEFA executive committee to dictate how it is enforced. Therefore, Article 49 constituted an agreement capable of restricting competition within Article 101.

The third sub-question focused on whether the actions of UEFA under Article 49 could be saved from competition law on foot of the Wouters criteria – legitimate objective, inherency and proportionality. While concluding that the policy motivations behind Article 49 by UEFA were well-founded and could be regarded as a legitimate justification, the restrictions caused by Article 49 are not proportionate to achieving this goal. Considering this, my answer to sub-question 3, and the second part of the research question, is that UEFA can't avail of the Wouters criteria to prevent its Article 49 from being deemed a violation of Article 101 unless they produced more adequate guidelines than those referenced in section 3.14. What these "more adequate" guidelines might entail is a difficult determination to make. However, it is plausible that UEFA might need to concede to the creation of a breakaway league in the future. Unless they decide to compromise once more on their current structure and readjust it to the favour of the most powerful clubs. Either way, UEFA is still firmly in the crosshairs of the ESL with the CJEU preliminary ruling expected early next year bound to reignite the conversation.

Finally, the fourth sub-question invited me to engage in descriptive, comparative, and analytical research as I tackled the issue of competitive balance and its pertinence to the European Model of Sport. In documenting the US model of sport, I outlined how certain mechanisms of competitive balance are unsuitable for the European model on the grounds of both economic and cultural differences. However, the bureaucratic issues plaguing European football are not irreparable and I laid the foundation for how the EU can intervene to solve this with adequate Social Dialogue.

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