

2014

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Recommended Citation

Kevin Kehrli, *The Unspecified Specificity of Sport: A Proposed Solution to the European Court of Justice's Treatment of the Specificity of Sport*, 39 *Brook. J. Int'l L.* (2014).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol39/iss1/7>

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THE UNSPECIFIED SPECIFICITY OF SPORT: A PROPOSED SOLUTION TO THE EUROPEAN COURT OF JUSTICE'S TREATMENT OF THE SPECIFICITY OF SPORT

European football is among the world leaders in revenue generation.¹ Despite this perceived success, due to a combination of inflated wages, large cash transfer fees, and pressure from supporters to compete and succeed at the highest levels, football clubs often spend far more than the revenue they bring in.² In response to the financial frailty among football clubs across Europe, the Union des Associations Européennes de Football (“UEFA”)³ promulgated a set of rules called the UEFA Club Licensing and Financial Fair Play Regulations (“Financial Fair Play” or “FFP”).⁴

The purpose of these regulations is to, inter alia, “improve the economic and financial capability of the clubs”⁵ and to “introduce more discipline and rationality in club football finances.”⁶

1. For example, the Barclay’s Premier League, England’s top division of football, generated revenue of €2.5 billion in the 2010–2011 season. *Annual Review of Football Finance 2012*, DELOITTE, <http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/Industries/Sports%20Business%20Group/uk-sbg-annual-football-finance-review-2012-highlights.pdf> (last visited Sept. 27, 2013).

2. See, e.g., *Premier League Clubs Boast £3.1 Billion in Debt*, GUARDIAN (June 2, 2009), <http://www.guardian.co.uk/football/2009/jun/03/english-premier-league-debt>.

3. Unlike most sports organizations in the United States, the Union des Associations Européennes de Football is not commonly referred to as “the UEFA,” but rather called “UEFA.” See, e.g., *About UEFA—Overview*, UEFA, <http://www.uefa.com/uefa/aboutuefa/organisation/history/index.html> (last updated May 25, 2013) [hereinafter *About UEFA—Overview*].

4. UEFA, UEFA CLUB LICENSING AND FINANCIAL FAIR PLAY REGULATIONS (2012), available at http://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf [hereinafter UEFA CLUB LICENSING REGULATIONS].

5. *Id.* art. 2(2)(a).

6. *Id.* art. 2(2)(c).

However, since UEFA approved the Financial Fair Play regulations in 2010,⁷ there has been vast speculation as to their compatibility with European Union law, including the right to free movement and competition law.⁸ This speculation stems from uncertainty about the amount of power conferred upon the European Court of Justice (“ECJ” or the “Court”) to evaluate sporting claims, and the Court’s consistent findings that sporting rules or regulations are incompatible with EU law.⁹

EU law is based on various treaties developed over the course of sixty years.¹⁰ The applicable treaty today is the Treaty on the Functioning of the European Union (“Treaty” or “TFEU”).¹¹ While many provisions of the treaties have changed over the EU’s long history, the provisions relating to sports governance have remained substantively the same, with the exception of their numbering.¹²

In the ECJ’s first ruling on sports governance, *Walrave v. Association Union Internationale*,¹³ the Court declared that the “practice of sport is subject to [EU] law only in so far as it constitutes an economic activity within the meaning of . . . the Treaty.”¹⁴ Since the decision, while European courts have

7. *Financial Fair Play*, UEFA, <http://www.uefa.com/uefa/footballfirst/protectingthegame/financialfairplay> (last visited May 20, 2013).

8. See, e.g., Johan Lindholm, *The Problem with Salary Caps under European Union Law: The Case Against Financial Fair Play*, 12 TEX. REV. ENT. & SPORTS L. 189 (2011).

9. Richard Parrish, *Reconciling Conflicting Approaches to Sport in the European Union*, in PROFESSIONAL SPORT IN THE EU: REGULATION AND REGULATION 21 (2000) [hereinafter Parrish, *Reconciling Conflicting Approaches*].

10. *Timeline of the European Union*, EUROPEAN INST. (Nov. 13, 2009), <http://www.europeaninstitute.org/EU-Facts/timeline-of-the-european-union.html>.

11. *Id.*

12. Therefore, even though European Court of Justice (“ECJ”) decisions refer to the article numbers in effect at the time of the decision, this Note will refer to the applicable article numbers of the Treaty on the Functioning of the European Union (“Treaty” or “TFEU”). For example, in *Dona v. Mantero*, decided in 1976, the ECJ discussed the free movement of workers provision as Article 48. Case C-13/76, *Dona v. Mantero*, 1976 E.C.R. 1333, para. 39. Under the TFEU, the free movement of workers provision is Article 45. This Note will use Article 45 to refer to that provision.

13. Case 36/74, *Walrave v. Ass’n Union Cycliste Internationale*, 1974 E.C.R. 1405.

14. *Id.* para. 4.

acknowledged the potential of a “sporting exception’ in which rules of purely sporting interest were removed from the scope of the Treaty,”¹⁵ they have struggled to separate pure sporting rules from non-exempt areas of law such as competition, free movement of workers, and other treaty provisions.¹⁶ As a result of this struggle, the ECJ has often found that sporting rules are incompatible with the Treaty based on the principle of proportionality, which “requires that action undertaken must be proportionate to its objectives,”¹⁷ even though it found that the objectives of the regulations were legitimate based on social or public interests.¹⁸

Using a challenge to the Financial Fair Play regulations as a paradigm of how the Court would analyze a challenge to sports regulation, this Note argues that the ECJ’s strict use of the principle of proportionality does not take into account the specificity of sport¹⁹ that the ECJ itself established, resulting in overregulation.²⁰ Therefore, in order to account for the unique nature of sports regulation, such as the preservation of equal competition and interdependence among competitors, the ECJ should first determine whether the regulations in question af-

15. RICHARD PARRISH & SAMULI MIETTINEN, *THE SPORTING EXCEPTION IN EUROPEAN UNION LAW* 1 (2008).

16. *See Dona*, 1976 E.C.R. 1333, para. 12 (challenging rules under free movement and nationality discrimination provisions).

17. TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 136 (2d ed. 2006).

18. *See* Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010) (encouragement, recruitment, and training of young players can justify a restriction); Case C-415/93, *Union Royal Belge de Societes de Football Association ASBL v. Bosman (Bosman)*, 1995 E.C.R. I-4921 (maintaining a competitive balance and encouraging recruitment and training of young players can justify a restriction).

19. “For several years now, both politicians and legal scholars have discussed the much vexed question of the so-called ‘sporting exception’ to European Union law, sometimes referred to as the ‘specificity of sport.’” Gianni Infantino, *Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport*, UEFA (Feb. 10, 2006), http://www.uefa.org/MultimediaFiles/Download/uefa/KeyTopics/480391_DOWNLOAD.pdf.

20. While throughout the sporting cases presented to the ECJ, the Court consistently found that the goals of the rules in question were legitimate, the principle of proportionality left the Court with little choice but to find the rules incompatible with the Treaty. *See, e.g., Bosman*, 1995 E.C.R. I-4921. *But see* Case C-519/04, *Meca-Medina v. Comm’n*, 2006 E.C.R. I-6991.

fect a fundamental right²¹ or a non-fundamental right.²² Because fundamental rights warrant the use of strict proportionality, the ECJ's analysis of these challenges should remain the same. However, when non-fundamental rights are involved, the Court should apply a less exacting, or "non-fundamental" proportionality test, which would lead to a finding that certain practices comply with the Treaty even though those practices would not meet the standard of proportionality currently applied by the ECJ.

Part I will discuss the basic structure of UEFA, the Financial Fair Play regulations, and the development of EU sports law. Part II will apply current EU sports law to Financial Fair Play and show that a strict application of the principle of proportionality would lead to a finding that the regulations are incompatible with the Treaty. Part III will propose a new approach where the ECJ would first distinguish between fundamental and non-fundamental EU rights, and then apply a lower proportionality standard to non-fundamental rights in order to grant sporting organizations the deference required for efficient internal regulation.

I. UEFA, FINANCIAL FAIR PLAY, AND THE DEVELOPMENT OF EUROPEAN UNION SPORTS LAW

UEFA is "one of six continental confederations of world football's governing body, [Fédération Internationale de Football Association ("FIFA").]"²³ As the continental confederation for Europe, UEFA grants licenses to national football associations and clubs²⁴ and is currently comprised of fifty-three European members.²⁵ In addition to "fostering and develop[ing] unity and

21. See discussion *infra* Part III.A.

22. *Id.*

23. *About UEFA—Overview*, *supra* note 3; see also *The Organisation*, FIFA, <http://www.fifa.com/aboutfifa/organisation/index.html> (last visited Sept. 29, 2013).

24. An example of a national football association is England's aptly named "Football Association" or "The FA." The FA's duties include "promoting the development of [football], . . . regulating the game on and off the field, . . . sanctioning all matches, leagues and competitions played in England, . . . [and] organizing . . . national competitions." *About the Football Association—The FA Strategic Plan 2011–2015*, THE FA, <http://www.thefa.com/about-football-association/strategy> (last visited May 20, 2013).

25. *About UEFA—Overview*, *supra* note 3; UEFA CLUB LICENSING REGULATIONS, *supra* note 4, art. 5.

solidarity among the European football community,”²⁶ UEFA hosts the most prestigious and lucrative club tournaments in world football.²⁷ Only licensed clubs from member associations can participate in these tournaments, and because compliance with UEFA regulations is required to obtain a license, the financial incentive to comply is too high for most clubs to risk non-compliance.²⁸

UEFA enacted its Financial Fair Play regulations in response to “repeated, and worsening, financial losses” among football clubs.²⁹ The federation’s fears were not unfounded; between the approval of FFP in 2010 and its implementation in 2012,³⁰ as many as ten clubs declared bankruptcy due to overspending.³¹ One example is the Scottish club Glasgow Rangers,³² who were

26. *About UEFA—Overview*, *supra* note 3.

27. In European football, the terms tournament, league, and cup are often used interchangeably. These tournaments include the Champions League, Europa League, and Super Cup. The most lucrative of the tournaments is the Champions League, which distributed €904.6 to clubs that competed in the 2012–2013 tournament. *Management Clubs Benefit from Champions League Revenue*, UEFA CHAMPIONS LEAGUE (July 23, 2013), <http://www.uefa.org/management/finance/news/newsid=1975196.html> [hereinafter *Champions League Revenue*].

28. “Facing the prospect of being punished with heavy fines and barred from European competition, [football clubs] are desperate to make sure that generated revenues are equal or greater than expenditure[s].” *Fair Play? Football Clubs Seek to Beat Financial Offside Trap*, CNN, <http://edition.cnn.com/2012/08/23/sport/football/football-financial-fair-play-trabzonspor/index.html> (last visited May 20, 2013).

29. *Financial Fair Play*, *supra* note 7.

30. *See Servette Geneva File for Bankruptcy*, FOURFOURTWO.COM (Mar. 1, 2012, 6:10 PM), <http://fourfourtwo.com/news/restofeuropa/96534/default.aspx>; *Portsmouth in Administration as Championship Club Face Another Fight for Survival*, DAILY MAIL (Feb. 17, 2012, 3:20 PM), <http://www.dailymail.co.uk/sport/football/article-2102526/Portsmouth-administration.html>.

31. Such overspending is the result of large transfer fees, which are lump sum payments to other clubs to acquire a player and very high salaries of players and managers. *The Football Debt League—Top 10 Most Indebted Clubs*, SOCCERLENS.COM, <http://soccerlens.com/the-football-debt-league-top-10-most-indebted-clubs/50035/> (last visited May 20, 2013).

32. Unlike American sports, football clubs are often referred to by city and team name without the article “the.” For example, the American baseball team is called “the Texas Rangers” or “the Rangers,” whereas the Scottish football club is just called “Glasgow Rangers” or “Rangers.” *See, e.g., Rangers Dropped to Lowest League in Scotland*, USA TODAY (July 14, 2012, 12:03 AM), <http://www.usatoday.com/sports/soccer/story/2012-07-13/glasgow->

frequent champions of Scottish football.³³ The club, founded in 1873,³⁴ recently declared bankruptcy; and after a vote among other teams in the Scottish Premier League, the club was forced to begin the 2012–2013 season in the lowest competitive tier of professional football in Scotland.³⁵ Although an extreme example of a club's financial collapse, Glasgow Rangers' bankruptcy demonstrates that even the world's most popular clubs are not immune to the perils of overspending.³⁶

A. Financial Fair Play Regulations

Seeking to prevent further instances of insolvency, UEFA's Financial Fair Play regulations require that clubs "live within their means' or break even based on football-related income at least matching their football-related expenditure[s]."³⁷ Additionally, there are several non-financial requirements listed in the FFP Regulations.³⁸ For example, a club must show that it has "a youth development program, player registration, training facilities, a general manager, a financial officer, a media

rangers-dropped-to-lowest-league-in-scotland/56212348/1 [hereinafter *Rangers Dropped*].

33. Rangers have won fifty-four league championships, the most of any team in the Scottish Premier League. *Id.*

34. *History—Founding Fathers*, RANGERS, <http://www.rangers.co.uk/club/history/club-history/item/499-founding-fathers> (last visited May 20, 2013).

35. *Rangers Dropped*, *supra* note 32.

36. See, e.g., *Shocking DEBTS and Financial Trouble: Rangers, Liverpool, Spurs, Leeds and More Big Clubs in Dire Straits*, TALKSPORT (Feb. 15, 2012), <http://www.talksport.co.uk/magazine/features/2012-02-15/shocking-debts-and-financial-trouble-rangers-liverpool-spurs-leeds-and-more-big-clubs-dire-straits>. Rangers' insolvency also demonstrates the ripple effect that can occur when a club goes bankrupt. Not only are the club's players, supporters, creditors, and sponsors affected, but the future of the Scottish Premier League as a whole could be in jeopardy due to the league's reliance on the revenue and spectacle its top rivalry creates. See *Rangers Football Club Enters Administration*, BBC NEWS (Feb. 14, 2012, 2:54 PM), <http://www.bbc.co.uk/news/uk-scotland-glasgow-west-17026172>; *Dissolving Scotland's Old Firm*, N.Y. TIMES (Aug. 8, 2012), <http://www.nytimes.com/2012/08/09/sports/soccer/in-scottish-soccer-the-rangers-celtic-rivalry-is-rattled-to-its-core.html>.

37. *Platini Wins EC Backing for Financial Fair Play Regulations*, GUARDIAN (Mar. 22, 2012), <http://www.independent.co.uk/sport/football/news-and-comment/platini-wins-ec-backing-for-financial-fair-play-regulations-7580682.html>.

38. See UEFA CLUB LICENSING REGULATIONS, *supra* note 4, arts. 17–18, 20, 25, 28–40.

officer, [and] a supporter liaison officer . . . ”³⁹ If a club does not comply with the FFP regulations, UEFA or the club’s national association can revoke, or refuse to renew, the club’s license.⁴⁰

For most of the larger, more established clubs, compliance with the non-financial regulations requires very little change to club policies, as it is likely that most of these processes and positions are either already in place, or would require only minor adjustments.⁴¹ Therefore, “[t]he [real] challenge for the clubs is to fulfill the break-even requirement,”⁴² even though the regulations account for deviations in clubs’ profits and expenses, allowing up to €5 million in losses each year.⁴³ Additionally, the regulations allow for excess losses up to €45 million for the 2013 and 2014 seasons, €30 million for the 2015 through 2018 seasons, and “a lower amount as decided by . . . the UEFA Executive Committee”⁴⁴ in the subsequent years, so long as “the excess [losses are] entirely covered from equity participants and/or related parties.”⁴⁵ This allows clubs with wealthy investors to continue to compete in UEFA competitions notwithstanding large losses until 2018,⁴⁶ as long as the investors are willing to contribute equity to cover any excess losses beyond the permissible deviation of €5 million.⁴⁷ However, if a club does not have the assistance of a wealthy benefactor, or other means of quickly generating income, the maximum allowable football loss without suspension of the club’s UEFA license is €5 million.⁴⁸ With such staggering sums of money involved, the owners, or even players, of a club whose license is revoked are likely to challenge the FFP regulations’ compatibility with EU free movement or competition law. Regardless of the compelling reasons for Financial Fair Play’s implementation, the ECJ

39. Ryan Murphy, *Playing Fair in the Board Room: An Examination of the Corporate Structures of European Football Clubs*, 19 MICH. ST. J. INT’L L. 409, 414 (2011) (citing UEFA CLUB LICENSING REGULATIONS, *supra* note 4, arts. 17–18, 20, 25, 28–40, 35, 36–39).

40. UEFA CLUB LICENSING REGULATIONS, *supra* note 4, art. 14.

41. Murphy, *supra* note 39, at 414.

42. *Id.*

43. UEFA CLUB LICENSING REGULATIONS, *supra* note 4, art. 61.

44. *Id.*

45. *Id.*

46. After 2018, the maximum deviation allowed will be decided by the UEFA Executive Committee. *Id.*

47. *Id.*

48. *Id.*

would likely find that the regulations are incompatible with the Treaty because the FFP regulations do not meet the strict standards of the proportionality test developed in EU case law.

B. The Development of EU Sports Law: From an Exception to a Justification

Over the course of nearly thirty years, the ECJ has recognized that sports are of a unique nature and therefore may warrant different treatment than other areas of the law. At first, the ECJ considered rules of a purely sporting interest to be outside the scope of the treaty, or an exception to the rules.⁴⁹ However, as more cases arose, this exception turned into a justification for restrictions on competition or the free movement of workers, subject to the principle of proportionality.⁵⁰ This section will introduce the relevant Treaty provisions and the principle of proportionality, outline the development of sports law and its application through a discussion of the landmark case law, then conclude with recent developments in the EU legislature's specific mention of sport.

1. The Relevant Treaty Provisions and the Principle of Proportionality

In order to better understand the development of EU sporting case law, a brief introduction of the relevant Treaty provisions is warranted.⁵¹ Challenges to sports regulations have generally been brought under three Treaty provisions. First, many early challengers invoked Article 12, which prohibits "any discrimination on grounds of nationality."⁵² However, recently this type of challenge has given way to free movement challenges under Article 45, which dictates "that free movement for workers

49. See Case 36/74, *Walrave v. Ass'n Union Cycliste Internationale*, 1974 E.C.R. 1405, para. 4.

50. See generally Simon Gardiner & Roger Welch, *Bosman—There and Back Again: The Legitimacy of Playing Quotas under European Union Sports Policy*, 17 EUR. L. J. 828, 828 (2011); PARRISH & MIETTINEN, *supra* note 15, at 87.

51. See discussion *infra* Part II.A.

52. See, e.g., Case C-13/76, *Dona v. Mantero*, 1976 E.C.R. 1333; *Walrave*, 1974 E.C.R. 1405.

shall be secured within the Union.”⁵³ Finally, these challenges are often paired with Article 101 challenges, which prohibit “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States.”⁵⁴

To analyze these claims, the ECJ applies the principle of proportionality, a general principle of EU law⁵⁵ that “requires that action undertaken must be proportionate to its objectives.”⁵⁶ The principle stems from the legal systems of various member states and “[i]ts development as a ground for review can be seen as the judiciary’s response to the growth of administrative powers and the augmentation of administrative discretion.”⁵⁷ The test for proportionality can be broken down into two requirements.⁵⁸ The first is whether the measure aims to achieve a legitimate objective.⁵⁹ There are many types of legitimate objectives, but these vary from case to case and often involve matters of public interest or public safety.⁶⁰ The second requirement is whether the measure is necessary and not overly restrictive.⁶¹ To determine necessity, the ECJ often asks “whether there are other less restrictive means of producing the same result.”⁶² This second requirement, often called the least restrictive means test, is what frequently leads to a finding that a regulation is incompatible with the Treaty.

53. See, e.g., Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010); Case C-415/93, *Bosman*, 1995 E.C.R. I-4921; *Dona*, 1976 E.C.R. 1333; *Walrave*, 1974 E.C.R. 1405.

54. See, e.g., *Bosman*, 1995 E.C.R. I-4921; *Walrave*, 1974 E.C.R. 1405.

55. TRIDIMAS, *supra* note 17, at 6.

56. *Id.* at 136.

57. *Id.*

58. Tridimas describes it as a three-part test, but states that “in practice, the [ECJ] does not distinguish in its analysis between the second and third test.” *Id.* at 139.

59. *Id.*; see also Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010); *Bosman*, 1995 E.C.R. I-4921; Case C-13/76, *Dona v. Mantero*, 1976 E.C.R. 1333; *Walrave*, 1974 E.C.R. 1405.

60. TRIDIMAS, *supra* note 17, at 136.

61. *Id.* at 139.

62. *Id.*

2. The Development of EU Sporting Case Law

In the 1974 case, *Walrave v. Association Union Cycliste Internationale*, the Court ruled on a sport governance matter that paved the way for the confusion still present in EU sports law today.⁶³ In the case, two cyclists challenged a rule promulgated by the Association Union Cycliste Internationale (“UCI” or “Cyclist Union”) that required the pacemaker to be of the same nationality as the cyclist.⁶⁴ The cyclists argued that this practice constituted discrimination on grounds of nationality under Article 12 of the Treaty and a restriction of free movement under Article 45.⁶⁵ The Court first stated that “the practice of sport is subject to [European] Community law in so far as it constitutes an economic activity,”⁶⁶ then concluded that the “composition of . . . national teams . . . has nothing to do with economic activity.”⁶⁷ Therefore, the Court found the rules in question did not fall within the scope of the discrimination and free movement provisions of the Treaty.⁶⁸ The Court’s interpretation in *Walrave* created the idea that “pure sporting rules” were removed from the scope of the Treaty, providing sporting organizations with a potential defense to challenges under EU law and laying the framework for much of the following thirty-five years of EU sporting case law.

Two years later, in *Dona v. Mantero*,⁶⁹ the Italian Football Federation (“IFF”) attempted to use this exception to validate a set of rules that indirectly⁷⁰ resulted in only Italian footballers being able to participate in professional or non-professional

63. *Walrave*, 1974 E.C.R. 1405.

64. *Walrave*, 1974 E.C.R. 1405, para. 2. The rule in question stated in French “l’entraîneur doit être de la nationalité de coureur,” which translates literally to “the coach must be of the nationality of rider.” *Id.* The ECJ clarifies the phrase idiomatically finding in English it means “[t]he pacemaker must be of the same nationality as the stayer.” *Id.*

65. The applicant also included a free movement of services claim, but the ECJ analyzed both claims together. *Id.*

66. *Id.* para. 4.

67. *Id.* para. 8.

68. *Id.* para. 13.

69. Case C-13/76, *Dona v. Mantero*, 1976 E.C.R. 1333.

70. The rule said that only players who were affiliated with the Italian Football Federation could take part in matches, but affiliation to the federation was only available to Italian nationals. Therefore, only Italian nationals could take part in matches. *Dona*, 1976 E.C.R. 1333, para. 5.

matches.⁷¹ The Court again spoke of “the possibility that certain specific rules could constitute ‘purely sporting’ rules that were not contrary to the Treaty freedoms and their requirement of non-discrimination,”⁷² but without much explanation, found that the IFF’s rules were incompatible with the Treaty.⁷³ Because the Court failed to elaborate on what type of rules could constitute purely sporting rules other than the national team selection rules in *Walrave*, sporting organizations were left with little guidance on how to regulate.⁷⁴

Nearly thirty years after *Walrave*, in *Union Royal Belge de Societes de Football Association ASBL v. Bosman*,⁷⁵ the Court drastically narrowed the “pure sporting rules” exception, but opened the door to another possible defense for sporting organizations.⁷⁶ Jean-Marc Bosman was a Belgian football player whose contract had expired with RFC Liege, a football club in Belgium’s highest division.⁷⁷ Several other clubs were interested in signing Bosman, but transfer negotiations between RFC Liege and the interested clubs were unsuccessful because RFC Liege demanded too high of a price.⁷⁸ Subsequently, RFC Liege refused to let Bosman leave the club and reduced his wages,⁷⁹ prompting Bosman to challenge RFC Liege’s transfer practices,

71. *Id.*

72. PARRISH & MIETTINEN, *supra* note 15, at 84.

73. *Dona*, 1976 E.C.R. 1333, para. 2.

74. Klause Vieweg, *The Legal Autonomy of Sport Organizations and the Restrictions of European Law*, in PROFESSIONAL SPORT IN THE EU: REGULATION AND RE-REGULATION 84, 104 (Simon Gardiner, Richard Parrish, & Robert C.R. Siekman eds., 2009).

75. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921.

76. PARRISH & MIETTINEN, *supra* note 15, at 84.

77. *Bosman*, 1995 E.C.R. I-4921, para. 28. European football leagues are set up in different divisions, or tiers, with a promotion and relegation system whereby at the end of the season, the clubs that finish in the worst ranking of one division are “relegated” to the division immediately below. *See* discussion *infra* Part II.B.

78. *Bosman*, 1995 E.C.R. I-4921, paras. 28–34.

79. *Id.* para. 29.

as well as “the so called 3+2 rule,”⁸⁰ which limited the number of foreign players that each club could have on its roster.⁸¹

Bosman challenged the rules as being incompatible with Article 12, prohibiting discrimination based on nationality; Article 45, prohibiting restrictions on the free movement of workers; and Article 101, prohibiting competition distortion. The Court did not address Bosman’s challenges under Article 101, “perhaps recognizing the difficulties involved with the application of competition law to sporting competitions.”⁸² However, the Court did address the challenge under Article 45,⁸³ which “entail[s] the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.”⁸⁴

The Court again turned to the language of *Walrave* and *Dona* limiting the scope of the TFEU to sporting regulations that constitute economic activities, as defined in the Treaty.⁸⁵ More significantly, the Court added to the rule, stating that “within the context of economic sporting activity, [it] recognized a category of rules or practices ‘justified on non-economic grounds related to the particular nature and context of certain matches’ and limited to their proper objectives.”⁸⁶ This language represented the Court’s recognition that its definition of pure sporting rules, as formulated in *Walrave* and *Dona*, was too narrow due to the complex relationship between sport and its economic aspects.⁸⁷

Turning to the merits of Bosman’s challenge, the Court ruled that RFC Liege’s transfer policy was incompatible with Article 45 as it was “likely to restrict the freedom of movement of players who wish to pursue their activity in another member

80. PARRISH & MIETTINEN, *supra* note 15, at 86. “Under the 3+2 rule, teams could only have a maximum of three foreign players in a team plus a maximum of two foreign players who were classified as assimilated players in that they had been registered in the relevant national association for at least five years.” Gardiner & Welch, *supra* note 50, at 829 n.3.

81. Gardiner & Welch, *supra* note 50, at 829 n.3.

82. PARRISH & MIETTINEN, *supra* note 15, at 86.

83. Consolidated Version of the Treaty on the Functioning of the European Union, art. 45, Mar. 30, 2010, 2010 O.J. (C 83) 120 [hereinafter TFEU].

84. *Id.*

85. PARRISH & MIETTINEN, *supra* note 15, at 86.

86. *Id.*

87. *Id.* at 87.

state.”⁸⁸ However, such restrictions may still be justified under the principle of proportionality, and therefore compatible with the Treaty, if the “rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest.”⁸⁹ Applying this standard, the Court found that “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,” meeting the first prong of the proportionality test.⁹⁰ Next, however, the Court found that while the transfer rules in question have such an effect,⁹¹ the “same aims [could] be achieved at least as efficiently by other means.”⁹² Thus, by not meeting the least restrictive means test, the rules did not satisfy the second prong of the proportionality test and were therefore incompatible with the Treaty.⁹³

Similarly, the Court found that the 3+2 rule also placed an impermissible restriction on the free movement of workers.⁹⁴ The Court first distinguished the rule from the “purely sporting” national team rules in *Walrave* and *Dona* and found that the rule “has the effect of reducing the workers’ chances of finding employment.”⁹⁵ As a justification for the rule, the national associations⁹⁶ argued, inter alia,⁹⁷ that the rules “help[ed] to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.”⁹⁸ The Court conceded that maintaining a competitive balance could be a legitimate justification, but found that the 3+2 rule was “not sufficient to achieve [that] aim” because a single club could still acquire the best domestic players and

88. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921, para. 99.

89. *Id.* para. 104.

90. *Id.* para. 106.

91. *Id.* para. 108.

92. *Id.* para. 110.

93. *Id.* para. 114.

94. *Id.* para. 121.

95. *Id.* para. 124.

96. The Belgian National Football Association, UEFA, and German, French, and Italian governments argued in favor of the rules. *Id.* para. 122.

97. They also argued that the rule “serve[d] to maintain the traditional link between each club and its country” and that it was “necessary to create a sufficient pool of national players to provide the national teams with top players to field in all team positions.” *Id.* paras. 123–24.

98. *Id.* para. 125.

thus undermine the competitive balance. Therefore, the rule was not proportional to its objectives.⁹⁹

The *Bosman* ruling had a significant impact on the internal structure of sports organizations¹⁰⁰ and sparked concerns that the Court was interfering with “a whole raft of sectors never intended to be subject to supranational governance.”¹⁰¹ Further, the analysis showed that sporting interests, such as maintaining a competitive balance and recruiting and training youth players, could justify a restriction for the purposes of proportionality.¹⁰² However, by finding that these measures did not meet the least restrictive means test without further explanation, the Court again left sports regulators with very little guidance as to how they should regulate to achieve their goals.

Five years after *Bosman*, in 2000, the ECJ made two rulings within two days of each other that had a significant impact on EU sports law.¹⁰³ In the first case, *Deliege v. Ligue de Judo*,¹⁰⁴ the Court broadened its reach into sports governance and further narrowed the *Walrave* exception by “offer[ing] an expansive interpretation of ‘economic activity.’”¹⁰⁵ *Deliege* involved an amateur Judo¹⁰⁶ athlete who claimed that a set of European Judo Union rules, which restricted the number of participants in Judo tournaments on the basis of nationality, were incompatible with EU law.¹⁰⁷ In finding amateur sport “constitutes an economic activity within the meaning of . . . the [Treaty],”¹⁰⁸ the Court offered a broad and complicated interpretation of amateurism and its connection with economic activity within EU law.¹⁰⁹ It essentially said that there are means outside of remuneration that bring amateur athletics within the scope of economic activity, such as sponsorships, celebrity status, and

99. *Id.* para. 135.

100. Parrish, *Reconciling Conflicting Approaches*, *supra* note 9, at 29.

101. *Id.*

102. *Bosman*, 1995 E.C.R. I-4921, para. 106.

103. PARRISH & MIETTINEN, *supra* note 15, at 89.

104. Joined Cases C-51/96 & C-191/97, *Deliege v. Ligue de Judo (Deliege)*, 2000 E.C.R. I-2549, para. 10.

105. PARRISH & MIETTINEN, *supra* note 15, at 89.

106. Judo is a “sport developed from jujitsu [that] emphasizes the use of quick movement and leverage to throw an opponent.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 677 (11th ed. 2003).

107. *Deliege*, 2000 E.C.R. I-2549, para. 10.

108. *Id.* para. 13.

109. *Id.*

other grants or aid.¹¹⁰ However, without providing further explanation, “the Court left rather unclear how directly connected the economic activity must be for the sporting rule to be capable of constituting a restriction on the freedom to provide services.”¹¹¹ On the other hand, the Court did make clear “that the decisions of national amateur associations could be subject to [EU] law even where the sport itself had no direct economic dimension and the rule in question was non-discriminatory.”¹¹²

The second case, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball (Belgian Royal Federation of Basketball Clubs - FRBSB)*,¹¹³ involved the player transfer policies of the International Basketball Federation (“FIBA”).¹¹⁴ Although the transfer rules applied uniformly to all member federations, the Court still found “[t]he existence of an obstacle to freedom of movement.”¹¹⁵ Therefore, it had to determine whether “the need to prevent distortion of sporting competitions was capable of justifying those rules.”¹¹⁶ Though the Court found that the measures met the first prong of the proportionality test because the rules of “setting . . . deadlines for the transfers of players may meet the objective of ensuring the regularity of sporting competitions,”¹¹⁷ it concluded that the rules went “beyond what [was] necessary for achieving the aim pursued.”¹¹⁸ Therefore, the second prong of the proportionality test was not met.¹¹⁹ Again, the Court failed to elaborate on what would be a proportional rule, offering no guidance to sporting organizations as to what would constitute a rule that is proportional to its objectives.¹²⁰

110. *Id.*

111. PARRISH & MIETTINEN, *supra* note 15, at 91.

112. *Id.*

113. Case C-176/96, *Lehtonen v. Fédération Royale Belge des Sociétés de Basket-ball [Belgian Royal Federation of Basketball Clubs—FRBSB]* (*Lehtonen*), 2000 E.C.R. I-2681.

114. “Basketball is organized at world level by the [International Basketball Federation (‘FIBA)].” *Id.* para. 3. Like the structure of UEFA, FIBA is comprised of individual national federations. For example, *Lehtonen* involved the FRBSB, the Royal Belgian Basketball Federation. *Id.*

115. *Id.* para. 51.

116. PARRISH & MIETTINEN, *supra* note 15, at 92.

117. *Lehtonen*, 2000 E.C.R. I-2681, para. 53.

118. *Id.* para. 58.

119. *Id.*

120. PARRISH & MIETTINEN, *supra* note 15, at 93.

By the time the Court reached its decision in *Meca-Medina v. Commission*¹²¹ in 2006, EU sports law, while still imperfect and disconnected, was “underpinned by identifiable themes which define[d] the permitted scope of sports governance.”¹²² One of these themes, the “purely sporting” exception from the scope of the Treaty declared in *Walrave*, was essentially struck down by the Court’s decision in *Meca-Medina*.¹²³ *Meca-Medina* involved a challenge under Articles 45 and 101 by two professional swimmers who were banned from competition for two years after failing a drug test administered by Federation Internationale de Natation (“FINA”),¹²⁴ the international governing body of professional swimming.¹²⁵ The Court of First Instance¹²⁶ interpreted “th[e] anti-doping rules [as] concern[ing] exclusively non-economic aspects of sport, designed to preserve ‘noble competition.’”¹²⁷ The ECJ rejected this notion and interpreted precedent on rules of pure sporting interests very narrowly.¹²⁸ The Court held that if an activity falls under a provision of the Treaty, “that activity must satisfy the requirements of those provisions,”¹²⁹ thereby rejecting “the notion that a ‘purely sporting’ rule is of itself apt to escape the scope of application of the Treaty.”¹³⁰

Turning to the merits of the case, the Court found that “safeguard[ing] equal chances for athletes [to compete on level terms, without performance enhancing drugs], athletes’ health, the integrity and objectivity of competitive sport and ethical values in sport” were sufficient justifications to meet the first

121. Case C-519/04, *Meca-Medina v. Comm’n*, 2006 E.C.R. I-6991.

122. Stephen Weatherill, *The Influence of EU Law on Sport Governance*, in *SPORT, LAW, AND POLICY: REGULATION, RE-REGULATION AND REPRESENTATION* 79, 80 (Simon Gardiner, Richard Parrish & Robert C.R. Siekman eds., 2009) [hereinafter Weatherill, *The Influence of EU Law*].

123. PARRISH & MIETTINEN, *supra* note 15, at 96.

124. Weatherill, *The Influence of EU Law*, *supra* note 122, at 81.

125. See generally FEDERATION INTERNATIONALE DE NATATION, <http://www.fina.org/H2O/> (last visited May 20, 2013).

126. The Court of First Instance was created in 1989 to alleviate the increasing caseload of the European Court of Justice. *EU Factsheets: Court of Justice of the European Union*, CIVITAS, <http://www.civitas.org.uk/eufacts/FSINST/IN5.php> (last visited Sept. 30, 2013).

127. Weatherill, *The Influence of EU Law*, *supra* note 122, at 81.

128. Case C-519/04, *Meca-Medina v. Comm’n*, 2006 E.C.R. I-6991, para. 26.

129. *Id.* para. 28.

130. Weatherill, *The Influence of EU Law*, *supra* note 122, at 83.

prong of proportionality.¹³¹ Next, the Court gave deference to FINA's thresholds for punishment, and in a rare decision, found that the rules were not excessive or disproportional.¹³² However, it is worth noting that the Court did not apply the stringent, least restrictive means test used in prior decisions.¹³³ It is also important to note that this relaxed standard may indicate that when a case involves something that the Court does not approve of, such as using performance-enhancing drugs, it is less willing to offer the same fundamental protection. Further, *Meca-Medina* marked the end of the existence of a pure sporting exception, leaving only a sporting justification for the purposes of the proportionality test.¹³⁴

This approach was confirmed in *Olympique Lyonnais SASP v. Bernard*,¹³⁵ where the purely sporting exception was not even argued.¹³⁶ *Bernard* involved another Article 45 challenge to a transfer rule, which Olympique Lyonnais ("Lyon"), a French football club, claimed resulted in a restriction on the free movement of workers.¹³⁷ Bernard, a player whose trainee contract¹³⁸ with Lyon had expired, refused to sign a new contract with the club. Instead, he signed a professional contract with Newcastle United FC, an English club.¹³⁹ Lyon then sought compensation based on a French rule that said if a professional club trained a player between the ages of sixteen and twenty-two under a fixed term contract, that player must sign a professional contract with that club upon the expiration of the trainee contract or the club is entitled to damages.¹⁴⁰ The ECJ found that such rules "are likely to discourage [a] player from

131. *Meca-Medina*, 2006 E.C.R. I-6991, para. 43.

132. *See id.* para. 54.

133. The Court stated that since the "appellants [did] not specify at what level the thresholds should have been set[,] . . . it does not appear that the restrictions go beyond what is necessary." *Id.* para. 53.

134. PARRISH & MIETTINEN, *supra* note 15, at 87.

135. Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010).

136. *Id.*

137. *Id.* para. 17.

138. Players between the ages of sixteen and twenty-two are considered trainees and sign professional contracts once their trainee contracts expire. *Id.* para. 3.

139. *Id.* paras. 7–10.

140. *Id.* para. 47.

exercising his right of free movement"¹⁴¹ and therefore constituted a restriction incompatible with the Treaty.¹⁴²

The Court then applied the proportionality test. The Court reiterated that the special nature of sport gives rise to justifiable reasons of public interest,¹⁴³ but found that the rules did not meet the second prong of the proportionality test.¹⁴⁴ The Court reasoned that because the rules were based on damages, rather than actual compensation for training, they were "not necessary to ensure the attainment of [the] objective" of promoting the recruitment and training of young players, again showing the difficulties of meeting the second prong of the Court's strict proportionality standard.¹⁴⁵

Thus, having affirmed the elimination of a pure sporting exception from *Meca-Medina*, the *Bernard* Court left only a sporting justification for sporting rules that may implicate a provision of the Treaty.¹⁴⁶ Further, this standard applies to governance of both professional and amateur sports, due to the various ways in which both fall within the Treaty's definition of economic activity.¹⁴⁷ Finally, for such a rule or regulation to be justifiable, it must meet the strict proportionality standards set forth in both *Bosman* and *Lehtonen*.¹⁴⁸

C. *The White Paper on Sport and the Treaty of Lisbon*

In 2007, the Commission of the European Communities ("Commission") released the *White Paper on Sport*¹⁴⁹ ("White Paper") in order "to give strategic orientation on the role of sport in Europe, to encourage debate on specific problems, to enhance the visibility of sport in EU policy-making, and to raise public awareness of the needs and specificities of the sec-

141. *Id.* para. 35.

142. *Id.* para. 37.

143. *Id.* para. 39.

144. *Id.* para. 48.

145. *Id.* para. 50.

146. See Case C-519/04, *Meca-Medina v. Comm'n*, 2006 E.C.R. I-6991; PARRISH & MIETTINEN, *supra* note 15, at 87; Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010).

147. See Joined Cases C-51/96 & C-191/97, *Deliege*, 2000 E.C.R. I-2549, para. 57.

148. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921.

149. *Commission White Paper on Sport*, COM (2007) 391 final (July 11, 2007), available at http://ec.europa.eu/sport/documents/wp_on_sport_en.pdf [hereinafter *White Paper*].

tor.”¹⁵⁰ After highlighting several reasons why sport plays such an important role in society,¹⁵¹ the White Paper discussed “the specificity of sport,” emphasizing that the unique characteristics of sport make it subject to certain exemptions, such as organizational rules establishing separate competitions for men and women.¹⁵² Then, using similar language to the Court’s prior decisions regarding sport, the White Paper affirmed *Meca-Medina*’s rejection of pure sporting rules and said that “the assessment of whether a certain sporting rule is compatible with EU competition law can only be made on a case-by-case basis.”¹⁵³ This declaration by the Commission not only affirmed the end of the pure sporting exception but also reflected the legislature’s support for the use of sporting objectives as potential justifications for Treaty violations.¹⁵⁴

Next, the Treaty of Lisbon’s entry into force in 2009 marked “the first time that sport [was] subject to explicit reference within the treaties establishing and governing the European Union.”¹⁵⁵ However, the “content of the new provisions [were] drawn with conspicuous caution,”¹⁵⁶ making their “influence on sport in Europe both profound and trivial.”¹⁵⁷ Article 165(1) of the Treaty of Lisbon states that “[t]he Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”¹⁵⁸ The treaty’s cautious phrasing has two implications. The first implication involves a limited grant of power to govern in the field of sports law.¹⁵⁹ The Treaty of Lisbon grants the EU three

150. *Id.* at 2.

151. Such reasons included “enhancing public health,” *id.* at 3, “education and training,” *id.* at 5, “promoting volunteering and active citizenship,” *id.* at 6, “social inclusion, integration, and equal opportunities,” *id.* at 7, and “prevention of and fight against racism,” *id.* at 8.

152. *Id.* at 13.

153. *Id.* at 14.

154. Stephen Weatherill, *EU Sports Law: The Effect of the Lisbon Treaty*, in *EU LAW AFTER LISBON* 403, 403 (Andrea Biondi & Piet Eeckhout eds., 2012) [hereinafter Weatherill, *The Effect of the Lisbon Treaty*].

155. *Id.*

156. *Id.*

157. *Id.*

158. TFEU, *supra* note 83, art. 165. See also Weatherill, *The Effect of the Lisbon Treaty*, *supra* note 154, at 416.

159. Weatherill, *The Effect of the Lisbon Treaty*, *supra* note 154, at 416.

levels of governing power to various fields of law, called competences.¹⁶⁰ The strongest level is “exclusive competence,” which gives the EU sole power to “legislate and adopt binding acts in [a field].”¹⁶¹ The second, “shared competence,” allows both member states and the EU to legislate.¹⁶² The third, “support competence,” only gives the EU the power “to support, coordinate or compliment the action of the Member States” and does not grant any legislative power.¹⁶³ Of these three competences, Article 165 grants “only a supporting competence for the EU, the weakest type of the three.”¹⁶⁴ This shows the EU’s hesitancy to get too deeply involved with sport governance.

Next, and perhaps more importantly in relation to sports law, the Treaty’s explicit reference to sport validated the idea that the goals of sporting organizations are capable of justifying a restriction on competition or of free movement under certain circumstances. It also further confirmed the special nature of sport, the Commission’s statements from the White Paper, and the Court’s general approach to sporting cases.¹⁶⁵

II. A CHALLENGE TO FINANCIAL FAIR PLAY UNDER THE CURRENT STANDARD

UEFA began implementing the Financial Fair Play regulations at the beginning of the 2012–2013 season and has already withheld prize money from twenty-three clubs as sanctions for noncompliance with the regulations.¹⁶⁶ As more clubs feel the repercussions of such sanctions, the likelihood of a challenge under EU law increases. The most likely challenges to FFP would be either under Article 45, as a restriction on the free movement of workers, or under Article 101, involving agreements that affect trade. Under the current standard, analysis of a challenge is a four-step process. First, the Court must de-

160. *Division of Competences Within the European Union*, EUROPA (Mar. 23, 2010), http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm.

161. *Id.*

162. *Id.*

163. *Id.*

164. Weatherill, *The Effect of the Lisbon Treaty*, *supra* note 154, at 414.

165. Weatherill, *The Effect of the Lisbon Treaty*, *supra* note 154, at 416.

166. *UEFA Hands Out First Financial Fair Play Penalties*, BBC SPORT (Sept. 11, 2012), <http://www.bbc.co.uk/sport/0/football/19557934>.

termine whether the regulations are an economic activity within the meaning of the Treaty.¹⁶⁷ Next, the Court determines whether the regulations constitute a restriction according to each provision in question.¹⁶⁸ Third, the Court looks to the regulation's aims and determines whether the aims are capable of justifying the restriction.¹⁶⁹ Finally, the Court asks whether the regulations are sufficient to achieve those aims without going beyond what is necessary to do so.¹⁷⁰

A. Financial Fair Play as a Restriction on Free Movement and Competition

Applying the current standard of proportionality to FFP, “the practice of sport is subject to [EU] law only insofar as it constitutes an economic activity within the meaning . . . [of the] Treaty.”¹⁷¹ It is clear from case law that “this applies to the activities of professional and semi-professional football players, which are in the nature of gainful employment or remunerated service.”¹⁷² Additionally, although UEFA is based in Switzerland, a non-member state, and is governed by Swiss Law, the ECJ's ruling in *Bosman* shows that “an entity whose practi[c]es [infringe] on competition or free movement in the EU comes under its jurisdiction and EU law is applicable.”¹⁷³

Next, the free movement claim and the competition claim must be considered separately to determine whether the practices in question are compatible with the Treaty. Article 45(1) states that “[f]reedom of movement for workers shall be secured within the Union.”¹⁷⁴ In the context of sport, challengers have invoked two distinct sections of Article 45, Sections 2 and 3(b).¹⁷⁵ Section 2 prohibits restrictions on the freedom of

167. Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113, para. 27 (Mar. 16, 2010).

168. *Id.* para. 33.

169. *Id.* para. 21.

170. *Id.*

171. *Id.* para. 27.

172. Case C-13/76, *Dona v. Mantero*, 1976 E.C.R. 1333, para. 12.

173. Steven Stewart, *The Development of Sports Law in the European Union, Its Globalisation, and the Competition Law Aspects of European Sports Broadcasting Rights*, 16 *SPORTS LAW J.* 183, 189 (2009).

174. TFEU, *supra* note 83, art. 45(1).

175. *Id.* art. 45(2), (3)(b).

movement due to discrimination based on nationality¹⁷⁶ and Section 3(b) prohibits general restrictions on the right to move freely within the territory of member states.¹⁷⁷ The former type of restriction can be dismissed outright because the Financial Fair Play regulations apply equally to all clubs, and therefore do not discriminate on the basis of nationality, either directly or indirectly.¹⁷⁸ However, the latter restriction requires deeper analysis.

The *Bosman* Court stated that all “provisions which preclude or deter a national . . . from leaving his country . . . in order to exercise his right to freedom of movement . . . constitute an obstacle to [the freedom of movement] . . . even if they apply without regard to the nationality.”¹⁷⁹ The next question then becomes whether the Financial Fair Play regulations preclude or deter players from moving freely throughout the Union. Parrish and Miettinen refer to the minimum threshold for deterrence as a “substantial hindrance.” Referring to the ECJ decision of *Volker Graf v. Filzmoser Maschinenbau GmbH*,¹⁸⁰ they state that regulations that present “too uncertain and indirect a possibility . . . of hinder[ing] free movement . . . [do] not constitute a restriction.”¹⁸¹

The effects of Financial Fair Play on players’ ability to move freely within the EU exemplify this type of tenuous causal relationship. Actual or threatened UEFA sanctions on a club for noncompliance have multiple consequences. First, the club will be less inclined to over-spend, resulting in lower transfer fees and lower potential salaries for players. While this may decrease the number of clubs willing to spend large sums of money on a player, the player will still have several club options, including the opportunity to play in another country. Next, if a club’s UEFA license is revoked, this will make the club less at-

176. *Id.* art. 45(2); *see, e.g., Dona*, 1976 E.C.R. 1333; Case 36/74, *Walrave v. Ass’n Union Cycliste Internationale*, 1974 E.C.R. 1405.

177. *Id.* art. 45(3)(b); *see, e.g., Case C-325/08, Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113 (Mar. 16, 2010).

178. Lindholm, *supra* note 8, at 202.

179. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921, para. 96; *see also* PARRISH & MIETTINEN, *supra* note 15, at 59.

180. Case C-190/98, *Volker Graf v. Filzmoser Maschinenbau GmbH*, 2000 E.C.R. I-493.

181. PARRISH & MIETTINEN, *supra* note 15, at 59; *see also Volker Graf*, 2000 E.C.R. I-493, para. 25.

tractive to players who want to compete in UEFA competitions. However, because of the structure of UEFA competitions, if one club is not permitted to participate, another club will take its place, maintaining the amount of clubs participating in the competitions. Thus, since the FFP regulations would not affect a player's ability to join a club and participate in those competitions, it is unlikely that the ECJ would find that Financial Fair Play substantially hinders a player's right to free movement under Article 45 of the Treaty.

The next step is to determine whether Financial Fair Play constitutes a restriction of competition under Article 101, which states that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market [are] incompatible with the internal market."¹⁸² Therefore, in order to fall within the scope of Article 101, UEFA must either be an "undertaking" or an "association of undertakings."¹⁸³ Though not defined in the Treaty, the ECJ provided a sweeping definition of the term in *Höfner v. Macroton GmbH*,¹⁸⁴ where it ruled that "every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" constitutes an undertaking.¹⁸⁵ Thus, "an organization carrying out regulatory functions and economic functions will be subject to competition law in so far as its economic functions are concerned."¹⁸⁶

Based on this broad definition, and the Commission's White Paper, the Court would find that the UEFA's FFP regulations constitute an agreement between undertakings or among an association of undertakings. The White Paper "acknowledge[d] the usefulness of . . . licensing systems for professional clubs," but expressly stated that "[s]uch systems must be compatible with competition . . . provisions."¹⁸⁷ Further, the "White Paper listed as undertakings individual athletes performing services,

182. TFEU, *supra* note 83, art. 101.

183. PARRISH & MIETTINEN, *supra* note 15, at 110.

184. Case C-41/90, *Höfner v. Macrotron GmbH*, 1991 E.C.R. I-1979. *See also* Lindholm, *supra* note 8, at 198 (analyzing UEFA's status as an undertaking).

185. *Höfner*, 1991 E.C.R. I-1979, para. 21.

186. PARRISH & MIETTINEN, *supra* note 15, at 111.

187. *White Paper*, *supra* note 148, at 17.

sports clubs carrying out economic activities such as selling tickets, broadcasting or advertising rights, and national and international sports associations that commercially exploit a sports event as capable of constituting undertakings.”¹⁸⁸ UEFA and its FFP regulations meet both these standards. First, UEFA’s FFP regulations fall squarely into this category of licensing systems to which the White Paper refers.¹⁸⁹ Second, UEFA also commercially exploits football by coordinating ticket sales, selling advertising, and distributing media rights.¹⁹⁰

Additionally, case law shows that UEFA’s FFP regulations constitute an agreement between undertakings or among an association of undertakings. In *Piau v. Commission*,¹⁹¹ the ECJ ruled on a challenge to FIFA’s rules governing players’ agents.¹⁹² To rule on the matter, the Court first had to determine whether FIFA and its regulations fell within the scope of the Treaty.¹⁹³ The ECJ stated that FIFA was made up of national associations, and because those associations constitute “associations of undertakings . . . by virtue of the economic activities that they pursue,” FIFA also “constitutes an association of undertakings within the meaning of [the Treaty].”¹⁹⁴ Because UEFA is made up of the same national associations that the Court found determinative in *Piau*, UEFA is also an undertaking or association of undertakings within EU Law.¹⁹⁵

The next step in analyzing an Article 101 challenge is to determine whether the Financial Fair Play regulations “have an effect on trade between Member States.”¹⁹⁶ Again, the ECJ

188. PARRISH & MIETTINEN, *supra* note 15, at 111.

189. See UEFA CLUB LICENSING REGULATIONS, *supra* note 4, art. 1.

190. UEFA Champions League Revenue Distribution, UEFA CHAMPIONS LEAGUE (Sept. 12, 2012), <http://www.uefa.com/uefachampionsleague/news/newsid=1858497.html> [hereinafter *UCL Revenue Distribution*].

191. Case C-171/05P, *Piau v. Comm’n*, 2006 E.C.R. I-37.

192. *Id.* paras. 3–8. Upon Piau’s request, the Commission initiated a procedure to investigate FIFA’s rules. *Id.* para. 10. Subsequently, FIFA amended several of the rules and the Commission discontinued its investigation, saying that the amendments eliminated the “main restrictive elements of the . . . [r]egulations and that there was no longer any Community interest in continuing with the procedure.” *Id.* para. 19. Piau then brought an action to annul the Commission’s decision. *Id.* para. 29.

193. *Id.* paras. 3–8.

194. *Id.* para. 72.

195. *About UEFA—Overview*, *supra* note 3.

196. See PARRISH & MIETTINEN, *supra* note 15, at 113.

provided a broad definition of what constitutes an effect on trade for this purpose, requiring “only probable foresight of influence, direct or indirect, actual or potential, on the pattern of trade between Member States which can be either detrimental or beneficial.”¹⁹⁷ Though this also brings agreements that facilitate competition within the article’s scope, the “effect[] . . . must be ‘appreciable’ to fall within [EU]” law.¹⁹⁸ The Commission provided guidance as to what is appreciable in its notice entitled *Guidelines on the Effect of Trade Concept Contained in Arts. 81 and 82 of the Treaty*¹⁹⁹ and stated that “where the parties to an agreement . . . control less than 5% of the relevant market and the turnover of the products in question is less than €40 million[,] an agreement fails the appreciability test . . .”²⁰⁰

ECJ case law also dictates that the Court would find that FFP regulations have an appreciable effect on trade. In *Piau*, the ECJ looked to the agency fee regulations in question and, citing phrases such as “for a fee” and “transfer contract,” concluded that the regulations constituted an economic activity and therefore had an effect on trade.²⁰¹ Similarly, UEFA’s FFP regulations contain inherently economic language and their effects are far more pervasive than the rules in *Piau*. For example, a club that qualified to participate in the “group stage”²⁰² of UEFA’s 2012–2013 Champion’s League received “a minimum €8.6 million” in profit,²⁰³ while the winner of the

197. *Id.* (quoting Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)*, 1966 E.C.R. 337) (internal punctuation marks omitted).

198. *Id.* at 114 (citing Case 5/69, *Völk v. Vervaecke*, 1966 E.C.R. 295).

199. At the time of the notice, competition law was governed by Articles 81 and 82 of the Treaty. Commission Notice—Guidelines on the Effect of Trade Concept Contained in Articles 81 and 82 of the Treaty, para. 52, 2004 O.J. (C 101) 7.

200. PARRISH & MIETTINEN, *supra* note 15, at 114.

201. *See* Case C-171/05P, *Piau v. Comm’n*, 2006 E.C.R. I-37.

202. The group stage consists of thirty-two clubs. Those clubs are divided into groups of four based on a seeding system. Each club then plays every club in its group twice, once at home and once away, and is awarded three points per win and one point per draw. The top two clubs from each group advance into a knockout round. *Competition Format*, UEFA CHAMPIONS LEAGUE,

<http://www.uefa.com/uefachampionsleague/season=2013/competitionformat/index.html> (last visited May 20, 2013).

203. *Champions League Revenue*, *supra* note 27.

tournament, FC Bayern Munich, earned over €55 million in prize money.²⁰⁴ Also included in the FFP's compensation scheme are performance-based bonuses,²⁰⁵ and a market pool share that is split amongst the competing clubs.²⁰⁶ With such large figures involved, a club that routinely competes in the Champions League would suffer immense economic losses if its license were revoked for non-compliance. It follows that if the ECJ found that the *Piau* regulations of agency fees constituted an effect on trade, it would make a similar finding in regards to the compensation scheme of the FFP regulations.

With respect to the appreciability test, the Commission's guidance on trade effects suggests that UEFA and its FFP regulations would meet both the 5% relevant market threshold and the minimum turnover requirement of €40 million. "Market definition is particularly important in the context of [EU competition law],"²⁰⁷ and the Court can approach the problem in various ways.²⁰⁸ The *Piau* case offers guidance as to how the Court would define UEFA's market, but ultimately this determination is made at the Court's discretion.²⁰⁹ Although deciding the case on other grounds, the *Piau* Court stated that "the market affected by the [player agency] rules in question is a market for the provision of services where the buyers are players and clubs[,] and the sellers are the agents."²¹⁰ This notion suggests a willingness to "entertain notions of FIFA's activities in the 'football market,'"²¹¹ which would be analogous to the market affected by Financial Fair Play. Whether the Court intended to mean the world or the European football market is immaterial because, in either case, UEFA's market share would surpass the 5% appreciability threshold.²¹² Further, with UEFA's top tournament boasting a €904.6 million prize pool, the €40 million in turnover requirement is also met.

204. *Id.*

205. The bonuses consist of €1 million for a win and €500 thousand for a draw in the group stage, increasing as the tournament progresses. *Id.*

206. *Id.*

207. PARRISH & MIETTINEN, *supra* note 15, at 114.

208. *Id.*

209. *Id.*

210. Case C-171/05P, *Piau v. Comm'n*, 2006 E.C.R. I-37, para. 112.

211. PARRISH & MIETTINEN, *supra* note 15, at 114.

212. *Champions League Revenue*, *supra* note 27.

Finally, after meeting the two threshold requirements, in order to apply Article 101's analytical framework, the FFP regulations must restrict competition in some way.²¹³ The EU has recognized two types of restrictions on competition: those that have an *object* of negatively restricting competition, and those that have the *effect* of negatively restricting competition.²¹⁴ However, incidental restriction from an agreement with a legitimate objective might not constitute a restriction of competition if that restriction is unavoidable.²¹⁵

Financial Fair Play is anomalous in this regard. While the regulation's goal is "to protect the long-term viability and sustainability of European club football,"²¹⁶ thereby preserving competition conditions, the sanctions for non-compliance provided by the regulations constitute a restriction on the clubs' ability to participate in the European market for club football. The restrictive monetary or licensing sanctions are avoidable in that there are alternative means available to achieve the preservation of competition.²¹⁷ Thus, if the monetary or licensing sanctions are avoidable, the restrictions on competition caused by them are also avoidable, bringing the Financial Fair Play regulations within the scope of Article 101, subject to the principle of proportionality.

B. Proportionality

The principle of proportionality is recognized as a general principle of EU law and is applied across almost all aspects of EU governance.²¹⁸ To be proportional, Financial Fair Play must meet two requirements: (1) the regulations must have legitimate goals that are capable of justifying a restriction, and (2)

213. PARRISH & MIETTINEN, *supra* note 15, at 118. *See also* TFEU, *supra* note 83, art. 101(1) ("all agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the *prevention, restriction or distortion of competition* within the internal market") (emphasis added).

214. PARRISH & MIETTINEN, *supra* note 15, at 119; Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)*, 1966 E.C.R. 337, para. 3.

215. PARRISH & MIETTINEN, *supra* note 15, at 119.

216. UEFA CLUB LICENSING REGULATIONS, *supra* note 4, art. 2(2)(f).

217. *See* discussion *supra* Part II.B.

218. TRIDIMAS, *supra* note 17, at 136-39; *see* discussion *supra* Part I.B.

the regulation's means of achieving those goals must be necessary and not overly burdensome.²¹⁹

1. A Test of Legitimacy

Even when an agreement falls within the scope of Article 101, it may nonetheless be exempt from the Article if it “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.”²²⁰ This is the case when the “measure [is] appropriate and necessary to achieve its objectives,” or proportional to the agreement’s legitimate goals.²²¹ Within the context of competition, this framework uses the term “inherency” rather than the “justification” terminology applied in the context of free movement challenges.²²² This is because rules that contain inherent restrictions are not actually considered restrictions under Article 101, “whereas . . . justified rules under free movement are within the meaning of ‘restriction’” and are considered excused by the ECJ due to their legitimate goals.²²³ However, for the purposes of analysis, “[t]he practical differences are limited, since the analytical criteria applied to both are similar.”²²⁴ Further, although the language of Article 101 refers to goods, the ECJ has interpreted it to include distribution of services.²²⁵ Therefore, the next step in analyzing a challenge to Financial Fair Play is to determine whether the regulations’ aims justify the restriction.

Although the ECJ often found sporting regulations incompatible with the Treaty, it typically found that the regulation’s various goals had the potential to justify the restriction. First, in *Bosman*, the Court found that “the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results” was a legitimate goal that

219. TRIDIMAS, *supra* note 17, at 139.

220. TFEU, *supra* note 83, art. 101(3).

221. TRIDIMAS, *supra* note 17, at 139.

222. PARRISH & MIETTINEN, *supra* note 15, at 122.

223. *Id.* at 122–23.

224. *Id.* at 123.

225. See Case 309/99, *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, 2002 E.C.R. I-1577 (declaring that legal services are goods within the meaning of the Treaty).

could justify a restriction.²²⁶ This is also one of the main objectives of the Financial Fair Play regulations. By limiting the amount of acceptable losses each year, the regulations aim to level the playing field between the clubs that have investors with seemingly endless amounts of capital and the clubs that do not.

Additionally, in both *Bosman* and *Bernard*, the ECJ found that “encouraging the recruitment and training of young players” was also a legitimate goal.²²⁷ Financial Fair Play encourages such development. Because the costs associated with bringing young players through the club’s internal system are significantly lower than bringing established players in through transfers, a club struggling to meet Financial Fair Play’s break-even requirement would likely invest more in recruitment.²²⁸ Further, developing youth players can generate more football-related income because as those players develop, they can be sold to other clubs, which would raise money for bringing new players or improvements to the club.²²⁹

Another justification, which has not been tested before the ECJ, stems from the unique nature and structure of European football. European football associations operate on a promotion and relegation system, meaning that a club’s position in the standings at the end of each season determines the level that the club will play at in the next season.²³⁰ For example, in Eng-

226. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921, para. 106.

227. *Id.*; Case C-325/08, *Olympique Lyonnais SASP v. Bernard*, 2010 ECJ EUR-Lex LEXIS 113, paras. 7–10 (Mar. 16, 2010).

228. To illustrate, Cristiano Ronaldo and Lionel Messi are arguably the two best football players in the world. While Real Madrid FC, Ronaldo’s club, paid a record £80 million to acquire him, Lionel Messi joined his club, FC Barcelona, at age 13 without a transfer fee. Mark Ogden, *Christiano Ronaldo Transfer: Real Madrid Agree £80 Million Fee with Manchester United*, TELEGRAPH (Jun. 11, 2009), <http://www.telegraph.co.uk/sport/football/teams/manchester-united/5505073/Cristiano-Ronaldo-transfer-Real-Madrid-agree-80-million-fee-with-Manchester-United.html>; *Lionel Andrés Messi—Biography*, FCBARCELONA, <http://www.fcbarcelona.com/football/first-team/staff/players/messi/biography> (last visited May 20, 2013).

229. See, e.g., Rob Britton, *Feeder Clubs or Future Investors? The Arsenal and Porto Way*, FOOTBALLSPEAK.COM (Sept. 9, 2012), <http://footballspeak.com/post/2012/09/09/The-Arsenal-and-Porto-way.aspx>.

230. A. Nock, *Promotion and Relegation Systems of Europe*, FOOTBALLSPEAK.COM (Jul. 9, 2012),

land's Premier League ("PL"), the clubs who finish in the bottom three positions are relegated to the Championship, the second tier league.²³¹ Meanwhile, the top two clubs of the Championship are automatically promoted to the PL, while the third through sixth place clubs compete in a playoff to win the third promotion spot.²³² To maintain such a system, a consensual interdependence must exist.²³³ Further, any disturbance to this interdependence, like a club's bankruptcy, will have effects that ripple throughout each level of the sport. If a club that was about to be relegated collapsed financially, either a club that would otherwise not have been relegated would be, or a club that would otherwise have been promoted would not be. In either case, that club would suffer financial hardship from either the loss of income from going down to a lower league, or the loss of income that it would have expected from moving up to a higher one. By requiring clubs to maintain fiscal responsibility, Financial Fair Play seeks to achieve stability and avoid such disturbances in football's internal market. With such justifications, the ECJ would likely find that Financial Fair Play's effects on competition could be justified if proportional to these legitimate goals.

2. A Test of Necessity

Having met the first burden of proportionality, a legitimate objective, the next step in the analysis is to determine whether the Financial Fair Play regulations are necessary to achieve that goal and not overly burdensome. It is at this stage of the analysis that the ECJ has often found that a rule or regulation is incompatible with the Treaty. The most notable example of this is in *Bosman*, where the ECJ found that because the objectives of maintaining a competitive balance among the clubs and encouraging youth development could "be achieved at least as efficiently by other means," the rules in question were not proportional.²³⁴ Similarly, it is likely that the ECJ would find Financial Fair Play regulations would not meet this test due to

<http://footballspeak.com/post/2012/07/09/Promotion-and-Relegation-Systems.aspx>.

231. *Id.*

232. *Id.*

233. PARRISH & MIETTINEN, *supra* note 15, at 2.

234. Case C-415/93, *Bosman*, 1995 E.C.R. I-4921, para. 110.

the alternative means available for FFP to accomplish its fiscal responsibility goals. One example of an alternative means for FFP to achieve its goals is to incentivize fiscally responsible club management, rather than punish irresponsibility. In such a scheme, a reward could be given to those clubs that achieve an adequate financial balance, rather than sanctions for those that do not. This scheme could also help clubs that are struggling competitively because a team that has a good financial balance would likely spend the reward by purchasing players from other clubs, thus putting more “responsible” money into the football market. Another alternative could involve UEFA representatives acting as advisors to clubs that wish to comply. Instead of attempting to break even on its own, a club could assent to having a UEFA financial advisor on staff that would approve or deny decisions of the club based on its budget. By making participation voluntary, such a system would be less restrictive and would likely achieve the regulation’s aims just as effectively. Because a variety of less restrictive means are readily conceivable, Financial Fair Play would likely fail the test of necessity.

The Court in *Bosman* invalidated the second set of rules in question because they were “not sufficient to achieve [the] aim” of maintaining a competitive balance.²³⁵ The Financial Fair Play regulations are unlikely to meet this high standard. While the regulations will encourage many clubs to spend wisely, their reach is limited. First, the majority of clubs are unlikely to participate in UEFA cups due to the tournaments’ elite nature. For example, for an English club to participate in either the Europa League or the Champions League, it must either win one of England’s domestic tournaments, or finish in one of the top five or six positions in the Premier League, depending on a variety of factors.²³⁶ Although it is not impossible for a lower division club to win one of these tournaments, it is ra-

235. *Bosman*, 1995 E.C.R. I-4921, para. 135.

236. When a club has qualified for the Champions League, the most prestigious of the UEFA tournaments, it cannot also qualify for the Europa League. Therefore, the range of Europa League qualification can range from fifth place to seventh place, but three English clubs will qualify. *Frequently Asked Questions*, BARCLAYS PREMIER LEAGUE, <http://www.premierleague.com/en-gb/fans/faqs/who-qualifies-to-play-in-europe/> (last visited May 20, 2013).

re.²³⁷ Therefore, most of the clubs in the third or fourth tiers of English football would not suffer from having their licenses revoked by UEFA, unless the English Football Association enforces the revocation too. Because lower division clubs face the same problems of overspending, and are less likely to have a wealthy investor, the Court would likely find that FFP is not sufficient to achieve its goals.

Another decision where the ECJ invalidated a regulation on proportionality grounds was *Lehtonen*, where it found that the rules “went beyond what [was] necessary to achieve the aim pursued.”²³⁸ Although a similar reason to that in *Bosman*, this language suggests that the means used could pass the Court’s test if appropriately scaled back. Applied to Financial Fair Play, the ECJ would likely find that the extensive penalties for non-compliance go beyond what is necessary to achieve UEFA’s goals. For example, the regulations could achieve these means without revocation of a club’s license and keep the incentives for compliance by merely withholding a portion of a club’s prize money.

Therefore, although UEFA’s goals of ensuring stability of the sport, promoting fair competition, and promoting youth development through Financial Fair Play are legitimate, the aforementioned factors, combined with the ECJ’s history of finding sporting rules incompatible with the Treaty, make it highly unlikely that FFP would pass the test of proportionality.

III. A PROPOSAL FOR A NEW APPROACH TO SPORTS-RELATED PROPORTIONALITY

If the Court were to apply a less exacting standard of proportionality in certain areas of law that do not require such strong protection, it would allow for the Financial Regulations to stand without diluting its doctrinal protection of more fundamental rights. Both the ECJ and the European Commission have suggested that sports organizations should be granted “conditional autonomy” due to sport’s unique needs and struc-

237. In the past thirty years, only one winner has been from a league other than the Premier League. *FA Cup Information*, FA-CARLING.COM, <http://www.fa-carling.com/fa-cup/information/> (last visited Sept. 18, 2013); see also *Cup Final Statistics*, THEFA.COM, <http://www.thefa.com/Competitions/FACompetitions/TheFACup/History/cupfinalresults> (last visited May 20, 2013).

238. Case C-176/96, *Lehtonen*, 2000 E.C.R. I-2681, para. 58.

ture.²³⁹ Such autonomy should be conditioned upon “respect for the core norms of the Treaty,”²⁴⁰ such as fundamental human rights and a free market. While there is no doubt that sporting rules and regulations should not restrict an individual’s right to free movement and other fundamental rights, there is a strong argument “that the paradigm of open and unrestrained competition simply does not apply to competitive sport, because of the interdependence of sporting clubs and the pronounced detrimental effects of market exit.”²⁴¹ Therefore, with regard to sport governance, the ECJ should distinguish between restrictions that violate fundamental or core human rights and restrictions that violate EU competition law based on market efficiency. Once distinguished, the Court should continue to apply its exacting standard of proportionality to any regulation or rule that restricts fundamental rights, but should apply a lower standard to those that do not. This approach will serve to give deference to the organizations that are most familiar with the unique nature of sport.

A. Determining What Type of Right Is Involved

Determining whether a right is fundamental is not always simple and should be evaluated on a case-by-case basis. Additionally, challenges to sporting rules often come under multiple articles of the Treaty, so the Court must evaluate each claim individually to determine what rights are involved. However, because the ECJ’s normal practice is to evaluate each article claim individually in order to determine whether the rule falls within the scope of Treaty,²⁴² isolating the individual rights does not impose an excessive burden on the Court.

The development of what constitutes a fundamental right stems largely from ECJ case law. The seminal case in this development was *Internationale Handelsgesellschaft v. Einfuhr-*

239. “The story of the manner in which first the Court and more recently the Commission developed the law in its application to sport is a complex though intriguing one. It reflects the need to allow a *conditional* autonomy to sporting practices.” Weatherill, *The Effect of the Lisbon Treaty*, *supra* note 154, at 405.

240. *Id.*

241. PARRISH & MIETTINEN, *supra* note 15, at 104.

242. See, e.g., *Bosman*, 1995 E.C.R. I-4921.

und Vorratsstelle Getreide.²⁴³ In *Handelsgesellschaft*, German citizens contended that EU regulations were incompatible with certain fundamental rights embodied in the German Constitution.²⁴⁴ The ECJ found that although its actions need not conform to the German Constitution, “respect for fundamental rights forms an integral part of the general principles of law protected by the Court.”²⁴⁵ Since this decision, the ECJ has recognized a wide variety of fundamental rights through case law. Further, “there are now express references to their protection in the [Treaty] and the [EU] has acquired its own catalogue of fundamental rights in the form of the Charter [of Fundamental Rights of the European Union].”²⁴⁶ While not an exhaustive list, the Charter of Fundamental Rights of the European Union (“Charter”)²⁴⁷ is divided into six sections: dignity, freedoms, equality, solidarity, citizens’ rights, and justice.²⁴⁸ The enumerated rights range from the right to marry²⁴⁹ to the right of collective bargaining,²⁵⁰ and the rights to free movement of persons and services are highlighted in the preamble.²⁵¹ Ultimately, however, when a right is not expressly mentioned in the Charter, it is in the Court’s discretion whether to treat it as a fundamental right.

Under the proposed system, after a determination that a right is fundamental, the ECJ’s proportionality analysis would remain the same. For example, if the Court determined that a regulation created a restriction on an individual’s right to marry, it would first look to the aims of the rule to see if the restriction could be justified. Then, the Court would test the regulation’s necessity by asking whether there is a less restrictive, alternative means to achieving those aims; whether the regulations are sufficient to achieve those aims; and whether the reg-

243. Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125; TRIDIMAS, *supra* note 17, at 301.

244. *Internationale Handelsgesellschaft mbH*, 1970 E.C.R. 1125.

245. *Id.* para. 4.

246. TRIDIMAS, *supra* note 17, at 298.

247. *The Charter of Fundamental Rights of the European Union*, EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/charter/default_en.htm (last updated Feb. 21, 2001) [hereinafter *EU Charter of Fundamental Rights*].

248. *Id.*

249. *Id.*

250. *Id.* art. 28.

251. *Id.* pmbl.

ulations go beyond what is necessary to achieve them. By continuing to apply this “fundamental proportionality” standard, the ECJ would be able to preserve the respect for fundamental rights that it advocated in *Handelsgesellschaft*.

1. Non-fundamental Rights

The ECJ has not found that every right presented in a challenge under EU law deserves the same amount of protection. For example, in *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*,²⁵² the Court distinguished the right of a wholesaler to conduct its business from the right to make a profit and said that the guarantees afforded to fundamental rights “can in no respect be extended to protect mere commercial interests or opportunities.”²⁵³ In a similar case, *Liselotte Hauer v. Land Rheinland-Pfalz*,²⁵⁴ the applicant argued that regulations allowing the German government to deny her a vineyard permit²⁵⁵ infringed on her fundamental rights to property²⁵⁶ and freedom to pursue trade.²⁵⁷ The Court rejected the applicant’s argument and declined to extend fundamental protection to a type of restriction that is commonly “known and accepted as lawful . . . in [the] constitutional structure of all the Member States.”²⁵⁸

Under the proposed system, if the Court finds that a regulation infringes on a non-fundamental right or rule, instead of using the standard applied to fundamental rights, it would apply a “non-fundamental proportionality” standard that gives greater deference to the regulating organization. Using the *Hauer* case as an example, the Court would first ask whether the regulations in question are aimed at a legitimate goal. In regulating the vineyards in Germany, the government could have the goals of soil preservation, protecting public health by limiting wine consumption, or stabilizing the wine market, all of which would likely be legitimate. The next step would be the

252. Case 4-73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm’n*, 1974 E.C.R. 491.

253. *Id.* para. 14.

254. Case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

255. *Id.* para. 2.

256. *Id.* para. 4.

257. *Id.* para. 31.

258. *Id.* para. 22.

same test of necessity, but instead of the least restrictive means, sufficiency, and beyond necessity tests, the Court would simply ask whether the means chosen could be rationally expected to advance the intended goals. The Court would likely find that the *Hauer* permit system for vineyards would meet this standard and would therefore uphold the regulation. This system would give the ECJ the option to defer to regulating bodies that may have more adequate knowledge and insight into the best means of achieving a goal. It would also alleviate the problem of the ECJ having to consider every potential less restrictive means, whether realistic or not, to determine whether a rule is proportional. Finally, it would allow the ECJ to avoid diluting the fundamental rights doctrine when it does not consider that the rights involved warrant strict protection.

B. Financial Fair Play and the New Standard

Analysis of Financial Fair Play under the new standard would likely achieve a different result than under the Court's current standard. The first step, determining whether a restriction or violation of the Treaty exists, would remain the same. The next step in the new system would be to determine what right or rule is being violated. Then, the Court would determine whether each right or rule involved is either a fundamental or non-fundamental right. Finally, the Court would apply the corresponding standard of proportionality to determine whether the rule is compatible with EU law. Because of Financial Fair Play's legitimate goals and reasonable means of advancing them, the Court would likely find the regulations acceptable.

As discussed above,²⁵⁹ a claim against Financial Fair Play would likely come under Articles 45 and 101. However, because of the tenuous causal relationship between Financial Fair Play and a football player's ability to move from country to country freely, the Court would likely not go any further in its analysis of the Article 45 claim of discrimination based on nationality.²⁶⁰ That leaves only the Article 101 claim and the determination of whether the right to free competition would be considered a fundamental or non-fundamental right.

259. See discussion *supra* Part II.A.

260. See discussion *supra* Part II.A.

The likely starting point of the Court's analysis would be Article 16 of the Charter, which touches on the right to conduct a business.²⁶¹ However, the article merely states that "[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised."²⁶² Although Article 16 involves the freedom to conduct a business, it does not address any aspect of competition. Additionally, the Court would likely find that the phrase "in accordance with Community law and national laws" does not necessitate conducting a business with fiscal responsibility as required by FFP.²⁶³

Unlikely to find the Charter determinative, the Court would then look to case law as an indicator of whether unrestrained competition is fundamental. Here, the *Nold* case is particularly telling. The applicant in *Nold*, a wholesaler in the coal and construction materials industries, challenged a regulation that set the minimum amount of coal a purchaser must buy per year to remain a wholesaler.²⁶⁴ The applicant contended that by setting the minimum at a "quantity which greatly exceed[ed] [the business's] annual sales in [the] sector,"²⁶⁵ the regulation deprived the applicant of its "right [to] freely . . . choose and practice [its] trade or profession."²⁶⁶ The Court rejected this argument, finding that such regulations "must be viewed in the light of [their] social function."²⁶⁷ The Court went on to say that the applicant's inability to compete in the market due to the regulations represented a "mere commercial interest" that does not warrant fundamental protection.²⁶⁸

The effects of the regulations in *Nold* are similar to the effects of Financial Fair Play. First, the regulation is industry specific and affects undertakings differently depending on their size and profitability. Those affected in *Nold* were smaller organizations, which were unable to generate enough sales to match the minimum purchase quota.²⁶⁹ The Financial Fair

261. See *EU Charter of Fundamental Rights*, *supra* note 247.

262. *Id.* art. 16

263. *Id.*

264. Case 4-73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Comm'n*, 1974 E.C.R. 491, para. 1.

265. *Id.*

266. *Id.* para. 14.

267. *Id.*

268. *Id.*

269. See *id.* para. 1.

Play Regulations are likely to affect clubs that are less popular and less able to generate football-related income, whether it is through merchandise sales, television rights, or player sales. Second, the effect of the regulation for the *Nold* applicant was a total ban on the undertaking's access to the wholesale coal market.²⁷⁰ The effect of the FFP regulations on a non-complying club is less excessive because it would not ban all access to the football market. Instead the sanction would merely ban access into the UEFA sanctioned competitions, or European football market, allowing the club to continue to participate in competitions domestically. Therefore, the restraint on the free market from FFP regulations would be less pronounced than those in *Nold*. Third, viewed in light of their social function, as instructed by the *Nold* Court, the FFP regulations serve multiple purposes such as maintaining a competitive balance, encouraging youth development, and promoting market stabilization. Finally, because a club can still compete in other competitions to generate ticket revenue, develop and sell players to make a profit, and sell merchandise and media rights, the benefits of competing in the UEFA competitions represent no more than "a mere commercial interest"—similar to the interest seen in *Nold*. Therefore, taking the totality of these factors and the similarity of the effects to *Nold*, it is unlikely that the ECJ would find that the Financial Fair Play regulations restrict any fundamental rights that warrant such stringent protection.

The final step in the analysis is to determine whether the Financial Fair Play regulations can rationally be expected to advance the goals of maintaining a competitive balance, encourage youth development, and promote market stabilization. The Court would likely find that the regulation's sanctions could rationally advance each of these goals. Because Financial Fair Play would limit clubs from spending from their owners' personal finances, the regulations would advance the goal of narrowing the gap between clubs with wealthy benefactors and those operating on a modest budget. Next, the regulations will cause clubs to seek alternative means of finding players and sources of football-related income. Because bringing a player through a club's youth system is a means of achieving both of these objectives, it is reasonable to find that Financial Fair

270. *Id.*

Play would advance this goal. Finally, a market exit by a bankrupt or financially unstable club would cause a severe disturbance to the football market. By encouraging fiscal awareness and responsibility, the regulations would likely lead to fewer bankruptcies and therefore promote stability.

CONCLUSION

The ECJ's hesitation to grant sporting organizations extensive powers of self-governance is well founded due to the potential of abuse that comes with such autonomy. However, because of its distinct characteristics, the sports market does not appropriately fit within the EU's current legal framework. While sports governance will never fit perfectly into the framework of EU law, the proposed "non-fundamental proportionality" standard would allow the Court to defer to organizations' inside knowledge of the sports market. It would do so by granting the associations the necessary, but conditional, autonomy that they need to efficiently regulate, without diluting principles developed to preserve the respect for fundamental rights in the EU.

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