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BALANCING ACT: WILL THE EUROPEAN COMMISSION ALLOW EUROPEAN FOOTBALL* TO REESTABLISH THE COMPETITIVE BALANCE THAT IT HELPED DESTROY?

I. INTRODUCTION

*Some people think that [European] football is a matter of life and death. I don't take that attitude. I can assure them it is much more serious than that.*¹

This sentiment reflects the special place that European football holds for so many. The sport, which was first organized by London schools in 1863, has united Europe for nearly 150 years.² Today, fifty-two European nations have national European football associations, most of which organize professional leagues within their respective nation.³

Aside from the sport's social significance, European football has become a prominent part of Europe's entertainment industry. The commercialization of European football is often traced to the 1980s when television recognized European football as valuable content, and advertising revenue began to flow into the sport.⁴ In 2006, Deloitte & Touche estimated that across Europe, professional football generated £7.8 billion in total revenue.⁵ It seems clear, however, that the sport was not prepared for such economic growth. With the commercialization of European football came rising operating costs, most noticeably in the form of

* For purposes of this Note, the term "European football" refers to the sport known as soccer in the United States. The term is used here to refer specifically to the professional game within Europe.

1. This famous quote was first uttered by Bill Shankly, former manager of the English club Liverpool FC. Jens Pelle van den Brink, *EC Competition Law and the Regulation of European Football*, 7 *SPORTS LAW. J.* 105, 105 (2000).

2. See Wilfried Gerhardt, *The Colourful History of a Fascinating Game* (2000), http://www.fifa.com/fifa/history_E.html.

3. See UEFA, *Associations*, <http://www.uefa.com/uefa/aboutuefa/MatchAssociations/index.html> (last visited Jan. 20, 2007).

4. See UEFA, *VISION EUROPE 19* (2005), <http://www.uefa.com/newsfiles/374875.pdf>. "Vision Europe" is a report from UEFA, European football's governing body, outlining the strategy for governing the sport over the next decade. See *id.* at 4.

5. Press Release, Deloitte & Touche LLP, *Premiership Wages Drop for First Time Ever* (June 1, 2006), http://www.deloitte.com/dtt/press_release/0,1014,sid%253D%2526cid%253D120056,00.html. In June of 2006, £7.5 billion equaled just over \$14.5 billion. Press Release, U.S. Federal Reserve, *Historical Rates for United Kingdom* (Jan. 19, 2007), http://www.federalreserve.gov/releases/H10/hist/dat00_uk.htm.

player salaries. These higher stakes have put small-market clubs⁶ out of business, while many other clubs struggle to turn a profit.⁷ The few clubs that are financially stable generally operate in large markets in Europe. As the financial gap between large and small-market clubs grows, the sport itself has begun to suffer. Today, large-market clubs dominate European football in leagues across all of Europe, leaving the majority of clubs with no hope of remaining competitive. This lack of competitive balance in European football is the focus of this Note.

Within the professional sporting world it is generally accepted that there must be a competitive balance among teams in order to preserve the integrity of sporting competition, the interest of fans, and in turn, commercial success. In any sport, if a few elite teams are able to collect all of the best players so that other teams cannot provide reasonable competition on the field, results will become predictable, and spectators, sponsors, advertisers, and broadcasters will all lose interest.⁸ Thus, when the unrestricted market for players fosters a competitive imbalance among teams, it is within the interest of sporting associations, leagues, and organizations to enforce restrictions so as to restore a competitive balance.⁹

To some extent, European law has enhanced European football's growing lack of parity. More than a century ago the transfer system was created as a means to instill competitive balance among clubs in European football.¹⁰ This system remained largely in place until the 1995 landmark case *Union Royale Belge des Societes de Football Association ASBL v. Jean-Marc Bosman*, where the European Court of Justice (ECJ)¹¹ held

6. Throughout this Note, the term "club" shall be used to refer to European football teams.

7. See Jack Ewing et al., *Can Football Be Saved?*, BUS. WK. ONLINE, July 19, 2004, http://www.businessweek.com/magazine/content/04_29/b3892022.htm.

8. Adam Lewis et al., *Player Transfers*, in *SPORT: LAW AND PRACTICE*, 840, 846 (Adam Lewis & Jonathan Taylor eds., 2003).

9. *Id.*

10. James G. Irving, *Red Card: The Battle over European Football's Transfer System*, 56 U. MIAMI L. REV. 667, 668 (2002); see also *infra* Part II.B.

11. The European Court of Justice (ECJ) is an institution of the European Community. The ECJ, comprised of judges from each European Community member state, functions to ensure that Community law is interpreted and enforced uniformly by all member states. The ECJ has the power to settle disputes between Community member states, Community institutions, businesses, and individuals, as well as to make preliminary rulings on interpretation of European Community law at the request of national courts. The ECJ also includes Advocate Generals who provide detailed recommendations or "advisory opinions" to the court before it rules on novel issues of law. See Treaty Establishing the European Community (consolidated text), arts. 220–45, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

that the transfer system violated Article 48 of the Treaty of Rome.¹² Subsequently, the European Commission (EC)¹³ negotiated rule changes bringing the transfer system in line with the *Bosman* decision and with European competition law.¹⁴ Unfortunately, these changes seem to have undermined the transfer system's effectiveness. The resulting lack of parity among European football clubs has predictably led to a small group of elite clubs that dominate competition perennially.¹⁵ In turn, leagues in countries such as England and Italy are experiencing large drops in attendance.¹⁶ The current poor state of European football has prompted high-ranking people within the sport to call for limits on player salaries as a means of reestablishing competitive balance among clubs.¹⁷ However, questions remain as to whether a salary cap or other restrictive measures would be a violation of European competition law. Will the EC allow European football to reestablish the competitive balance that it helped destroy?

The purpose of this Note is to evaluate whether or not restricting the amount of money European football clubs can spend on player salaries in an effort to revitalize competitive balance would violate European competition law. Part II of the Note traces how the ECJ and EC have contributed to the sport's lack of competitive balance. Part III looks at salary caps and other policies meant to institute balance. Part IV reviews European competition law and governance of sport in Europe. Part V analyzes whether salary restrictions would violate European competition law, and whether salary restrictions could be exempt from EC regulation. Part VI is a conclusion.

12. Case C-415/93, *Union Royale Belge des Societes de Football Association ASBL v. Jean-Marc Bosman*, 1995 E.C.R. I-4921. See *infra* Part II.C.

13. The European Commission (EC) is the executive arm of the European Community. As such, it proposes legislation to parliament, manages and implements Community policies and budgets, and enforces European Community law. See EC Treaty, *supra* note 11, arts. 211–19. For purposes of this note, it is significant that the EC generally regulates and enforces EC competition law. See Irving, *supra* note 10, at 672.

14. See Irving, *supra* note 10, at 688–723; see also *infra* Part II.D.

15. Stratis Camatsos, *European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?*, 12 SPORTS LAW. J. 155, 178 (2005); see also *infra* Part II.E.

16. See *Premier League Probes Crowd Slump*, BBC SPORT (U.K.), Sept. 20, 2005, http://news.bbc.co.uk/sport2/hi/football/eng_prem/4264936.stm; *Juventus Deserve Bigger Crowds Says Moggi*, REUTERS (Rome), Oct. 4, 2005, <http://soccer.net.espn.go.com/news/story?id=344884&cc=5901>. See also *infra* Part II.E.

17. See Nick Harris, *Whelan Calls for a Top Flight Salary Cap*, INDEPENDENT (U.K.), Sept. 22, 2005, available at <http://sport.independent.co.uk/football/news/article314199.ece>; see also *infra* Part III.

II. THE PROBLEM: A LACK OF COMPETITIVE BALANCE IN EUROPEAN FOOTBALL

A. *The Structure of European Football*

In order to understand European football and its relationship with the law, a basic understanding of the structure of the sport would be helpful given that it differs from the American professional sports model. At the top of the hierarchy is the Federation Internationale de Football Association (FIFA) which governs football at the world level.¹⁸ FIFA is divided into confederations which govern each continent.¹⁹ The European confederation is the Union des Associations Europeennes de Football (UEFA).²⁰ UEFA is comprised of the national associations of each country in Europe.²¹ National associations must comply with UEFA regulations and decisions, and UEFA in turn, is subject to FIFA regulations.²² National associations govern virtually all aspects of football within their respective countries, including enforcement of FIFA and UEFA regulations, organization of leagues, the relationship between leagues and clubs, and the relationship between clubs and players.²³

Professional European football leagues are organized by nation and are generally structured quite differently from American leagues. The European approach features a divisional hierarchy within each league, and a system of promotion and relegation.²⁴ First division clubs play at a higher level than second division clubs, which play at a higher level than third division clubs, and so on.²⁵ In all divisions, at the end of the season, a limited number of the worst performing clubs (usually between one to four clubs) are relegated to the immediately lower division, while the

18. *Bosman*, 1995 E.C.R. at I-5044.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*; see, e.g., The Football Association—The Organisation, <http://www.thefa.com/TheFA/TheOrganisation> (outlining the role of the English national association, the FA).

24. See Stefan Szymanski & Tommaso M. Valletti, *Promotion and Relegation in Sporting Contests*, at 2 n.8 (2003), available at www.nhh.no/sam/stabssem/2003/szymanski.pdf.

25. See *id.* Taking England as our example, the top division in England is called the “Premier League” (or “Premiership”), which features the top twenty clubs in England. Below the Premier League is the English second division known as “Championship” which consists of the next best twenty-four clubs. Below Championship is “League One,” and below that is “League Two”—both of which also feature twenty-four clubs. See BBC Sport—Football, <http://news.bbc.co.uk/sport1/hi/football/default.stm> (last visited Jan. 20, 2007).

same number of top performing clubs in each division are promoted to the immediately higher division.²⁶

Aside from professional leagues, UEFA organizes pan-European competitions that bring together the top clubs from each national league, including the UEFA Champions League—the winner of which is considered the champion of Europe.²⁷ These competitions generally follow a format closer to the American model where clubs are split into groups and play only those clubs within their group.²⁸ At the end of the group stage, the winner and runner-up of each group advance to a series of knock-out rounds, similar to playoffs in American sports, where the winner advances and the loser is eliminated.²⁹ The last club remaining is the winner of the competition.

B. The Transfer System

The importance of comparatively level teams for the success of sporting leagues was recognized as far back as the late nineteenth century when the transfer system was first created in England.³⁰ The purpose of the system was to control player movement so that wealthier clubs could not buy the best players away from smaller clubs without compensation.³¹ Over time, the transfer system was adopted by leagues across all of Europe.³² Under the rules of the transfer system, at the end of a season, each club produced a list of players to be retained for the next season (retention list) and a list of players who were available for transfer to another club (transfer list).³³ Players that were not included on the transfer list had no right to demand a transfer.³⁴ Players that were on the transfer list could be purchased by another club for a “transfer fee” set by

26. See Szymanski & Valletti, *supra* note 24. Returning to the English system as our example, at the end of the season, the three worst performing clubs in the Premier League are relegated to Championship, and the top three clubs in Championship are promoted to the Premier League. See Premiership Standings—2005/06, <http://soccornet.espn.go.com/tables?league=eng.1&cc=5901>. Promotion and relegation also occur between Championship and League One, and between League One and League Two.

27. See UEFA—Champions League Format, <http://www.uefa.com/competitions/ucl/Format/index.html> (last visited Jan. 25, 2007).

28. See, e.g., *id.*

29. See, e.g., *id.*

30. See Irving, *supra* note 10, at 668.

31. *Id.* at 669.

32. See *id.*

33. *Id.*

34. *Id.*

the selling club.³⁵ Although the transfer system has been modified over time, this fundamental structure has remained unchanged.³⁶

It is significant that players whose contracts had expired were not exempt from the transfer system. Transfer rules were set out by both FIFA and UEFA, and incorporated into the rules of national associations which had some discretion as to how they were enforced.³⁷ As a result, club control over players who were no longer under contract varied from country to country within Europe.³⁸ Ultimately, however, UEFA and FIFA rules required that a transfer fee be paid to the former club at some point, in order to sign a player whose contract had expired.³⁹ By allowing clubs to receive transfer fees for players, whether under contract or not, the transfer system enabled small-market clubs to either retain their top players or be compensated for transferring them, and thus compete with big market clubs.⁴⁰ In short, the transfer system helped impose competitive balance throughout European football.

C. *The Bosman Decision*

In December of 1995, Jean-Marc Bosman, a little-known football player from Belgium, challenged the legality of the transfer system. The result was a decision from the ECJ that would fundamentally change the transfer system and the governance of sport in Europe.

Jean-Marc Bosman played for FC Liege, a Belgian first division club, and his contract was set to expire in June of 1990.⁴¹ On April 21, 1990, FC Liege offered Bosman a new contract that reduced his salary from 120,000 Belgian francs (BFR) per month to BFR 30,000 per month.⁴² Bosman rejected the offer and was placed on a transfer list with a transfer fee of more than BFR 11 million. This fee was calculated in accor-

35. *Id.*

36. Camatsos, *supra* note 15, at 157; *see also* Irving, *supra* note 10 (outlining in detail the development of the transfer system from its inception through *Bosman*).

37. *Bosman*, 1995 E.C.R. at I-5046.

38. *Compare* Irving, *supra* note 10, at 672 (noting that by 1978 England's transfer system allowed a player whose contract had expired to sign with a club of the player's choice even if his new club and his former club could not agree on a transfer fee, in which case transfer tribunals would determine the fee), *with Bosman*, 1995 E.C.R. at I-5047 (noting that the Belgian transfer system, like most European systems, allowed clubs to set a transfer fee for a player whose contract had expired, and such a player could not sign with a new club until the new club agreed to pay the transfer fee).

39. *See Bosman*, 1995 E.C.R. at I-5047.

40. Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L. J. 293, 298 (2005).

41. *Bosman*, 1995 E.C.R. at I-5050.

42. *Id.*

dance with the transfer rules as set out by the Union Royale Belge des Societes de Football Association ASBL (URBSFA), Belgium's national association.⁴³ By June 1, no clubs had showed interest in Bosman given his high transfer fee, so according to URBSFA rules, a "free" transfer period began during which a club could negotiate a mutually agreeable transfer fee with FC Liege.⁴⁴ Once the free transfer period began, Bosman arranged a contract with US Dunkerque, a second division French club, at BFR 100,000 per month, plus a BFR 900,000 signing bonus.⁴⁵ US Dunkerque and FC Liege then agreed on a one-year transfer of Bosman for BFR 1,200,000, with an option to purchase a full transfer after one year.⁴⁶ However, FC Liege, concerned about US Dunkerque's solvency, withheld required paperwork and the transfer never took effect.⁴⁷ On July 31, FC Liege suspended Bosman for the entire 1990–1991 season, as was its right under URBSFA transfer rules.⁴⁸

Ultimately, after four years of lawsuits, the Belgian national courts referred two questions to the ECJ for a preliminary ruling.⁴⁹ One of the questions focused on whether Articles 48,⁵⁰ 85, and 86⁵¹ of the Treaty of Rome prohibited "a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club."⁵² Many within Europe felt that the very survival of football was at stake.⁵³

43. *Id.*

44. *See id.* at I-5046, I-5050.

45. *Id.* at I-5050–I-5051.

46. *Id.* at I-5051.

47. *Id.*

48. *Id.*

49. *Id.* at I-5056.

50. Article 48 of the Treaty of Rome (Treaty Establishing the European Economic Community) is now embodied in Article 39 of the Treaty Establishing the European Community. Article 39 guarantees freedom of movement for workers within the European Union. *See* EC Treaty, *supra* note 11, art. 39.

51. Articles 85 and 86 of the Treaty of Rome (Treaty Establishing the European Economic Community) are now embodied in Articles 81 and 82 (respectively) of the EC Treaty. For the text of Article 81 see *infra* note 126. For the text of Article 82 see *infra* note 118.

52. *Bosman*, 1995 E.C.R. at I-5056. The other question concerned whether or not foreign players could be restricted from European Community clubs and competitions. *See id.* This question is, however, outside the scope of this Note. *See* Lindsey Valaine Briggs, *UEFA v. The European Community: Attempts of the Governing Body of European Soccer to Circumvent EU Freedom of Movement and Antidiscrimination Labor Law*, 6 CHI. J. INT'L L. 439 (2005), for a discussion of this issue before, during, and after the *Bosman* decision.

53. *See* Irving, *supra* note 10, at 681 (detailing the sentiment of the football world in anticipation of the ECJ's decision).

After determining that the transfer system constituted an obstacle to the freedom of movement of workers, the ECJ held that

Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.⁵⁴

In reaching its conclusion, the ECJ accepted the importance of “maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results. . . .”⁵⁵ However, the ECJ found that the transfer system did not adequately maintain a competitive balance between clubs because it did not prevent the richest clubs from acquiring the best players.⁵⁶ Furthermore, the ECJ held that there were alternative means of imposing a competitive balance that did not impede freedom of movement of workers, including instituting a salary cap and/or revenue-sharing policies.⁵⁷ Ironically, after expressing support for a salary cap, the ECJ declined to apply competition law under Articles 85 and 86 of the Treaty of Rome, since the transfer system was already found to be in violation of Article 48.⁵⁸

D. European Commission Rule Changes

The European football world, though not happy with the ruling in *Bosman*, took comfort in the fact that the ECJ's decision invalidated the transfer system only as it applied to players whose contracts had expired.⁵⁹ Almost ninety percent of transfer revenue came from transfers of players who were still under contract, and FIFA and UEFA aimed at keeping what remained of the transfer system intact.⁶⁰ However, the *Bosman* decision, as highly public as it was, put the football world under

54. *Bosman*, 1995 E.C.R. at I-5073.

55. *Id.* at I-5071.

56. *Id.*

57. *Id.* at I-5072. Note that the ECJ here is referencing the advisory opinion of Advocate General Lenz. Recall that as part of the ECJ's structure, Advocate Generals issue advisory opinions before the ECJ rules on a novel issue. See EC Treaty, *supra* note 11. In his opinion on the *Bosman* case, Advocate General Lenz set forth that the possibility of a salary cap as a means of preserving competitive balance without restricting freedom of movement of workers meant that the transfer system was in violation of the Article 48 of the Treaty of Rome. See *Bosman*, 1995 E.C.R. at I-5017.

58. *Id.* at I-5078.

59. Irving, *supra* note 10, at 688.

60. *Id.* at 689.

a microscope, and the EC, which had not generally involved itself in the sports industry prior to *Bosman*, was now suspicious of the entire transfer system.⁶¹ The EC was beginning to question whether transfer fees might violate both Article 48 free movement of workers⁶² and European competition law.⁶³ In April of 1998, after the much publicized and high-priced transfer of Brazilian striker Ronaldo from FC Barcelona to Inter Milan, the EC warned FIFA that it would face official action if it did not amend its transfer rules.⁶⁴ Lengthy, complex, and trying negotiations involving the EC, FIFA, UEFA, and the players' union (FIFPro) ensued.⁶⁵ Finally, in 2001, six years after the ECJ decided *Bosman*, FIFA adopted a new transfer system.⁶⁶ A brief summary of the more significant rule changes follows.

One key rule provides that transfers can only take place during two limited periods of the year (transfer windows), one during the summer, and the other mid-season.⁶⁷ Furthermore, a player can only be transferred once in a single season.⁶⁸

In an effort to protect smaller clubs which usually develop younger players, new rules require purchasing clubs to compensate the selling club for the training of a player under the age of twenty-three.⁶⁹ The amount of the compensation fee is to be calculated according to a codified formula.⁷⁰ However, no compensation will be paid for transfers of

61. *Id.*

62. *See id.*

63. *EU Warning to FIFA on Rules of Transfer*, STATESMAN (India), Apr. 3, 1998.

64. *Id.* The entire football world paid close attention to the transfer of Ronaldo who, at barely 20 years old, was considered the best player in the world. In 1997, Ronaldo Luis Nazario de Lima, or "Ronaldo" as he is known internationally, became the first player to win back-to-back FIFA World Player of the Year awards. *See A Night of Records and Premieres*, FIFA.COM (1997), http://www.fifa.com/events/playergala/index_E_1997.html; *Ronaldo, the 20th Century Footballer*, FIFA.COM (1996), http://www.fifa.com/events/playergala/index_E_1996.html. Considered by many to be the best Brazilian scorer since Pelé, Ronaldo went on to win the award again in 2002. *See Ronaldo, Hamm Scoop Top Player Awards*, FIFA.COM (2002), http://www.fifa.com/events/playergala/MR_A/48852_E.html.

65. *See Irving, supra* note 10, at 688–722 (tracing, in depth, the negotiations from *Bosman* through to the 2001 agreement).

66. *Id.* at 716–17; FIFA, *Regulations for the Status and Transfer of Players*, July 5, 2001, available at http://www.fifa.com/fifa/handbook/regulations/player_transfer/2003/Status_Transfer_EN.pdf.

67. *Id.* at ch. 3, art. 5(2).

68. *Id.*

69. *Id.* at ch. 7, art. 15.

70. *Id.* at ch. 7, art. 16.

players over the age of twenty-three.⁷¹ To further protect smaller developmental clubs, when a player is transferred mid-contract, five percent of the compensation paid to the selling club will be distributed among all clubs that trained the player between the ages of twelve and twenty-three.⁷²

Additionally, a number of rules address contract stability.⁷³ The most significant of these rules allows players under twenty-eight years old to breach a contract unilaterally after the first three years, while players over twenty-eight years old can unilaterally breach after the first two years.⁷⁴

E. The Lack of Competitive Balance in European Football

Though the ECJ and the EC sought to protect a competitive balance among football clubs, the *Bosman* decision and the subsequent transfer system rule changes have only widened the gap between large and small-market clubs.⁷⁵ The *Bosman* decision liberalized player movement and shifted power from clubs to players.⁷⁶ This, in turn, has triggered a dramatic increase in player salaries.⁷⁷ Adding to the problem is the new rule allowing players unilaterally to breach their contracts, which forces clubs to pay top players astronomical salaries to prevent them from changing sides.⁷⁸ As a result, top players pool together on big-market clubs.⁷⁹

The rule creating transfer windows has also come under heavy scrutiny. Ironically, transfer windows both restrict freedom of movement and restrain competition, and thus seem to conflict with the *Bosman* decision and European competition law.⁸⁰ Furthermore, transfer windows allow big-market clubs to hold onto their money so that they can buy all of the top players available when the windows are open, rather than allowing the market to dictate when and where players' services are most valued.⁸¹ It is therefore more likely that small-market clubs will be pushed out of the market for top players when the windows are open.

71. *Id.* at ch. 7, art. 20.

72. *Id.* at ch. 9, art. 25.

73. *See id.* at ch. 8.

74. *See id.* at ch. 8, art. 21(1)(a) & (1)(b).

75. *See Camatsos, supra* note 15, at 178.

76. *Id.* at 173.

77. *Id.*

78. *See id.* at 173–74.

79. *See id.* at 174–75.

80. *Id.* at 170.

81. *Id.*

The rule prohibiting transfer fees for players over the age of twenty-three also effectively diminishes competitive equality. Big-market clubs can choose to exclusively pursue players twenty-four or older, and as a result never have to compensate small-market clubs for training.⁸²

As a result of *Bosman* and the EC-mandated rule changes, a select few clubs have dominated their respective leagues in recent years. In England's Premier League, four clubs—Arsenal, Chelsea, Liverpool, and Manchester United—have finished in the top five spots the last four seasons. In two of those four seasons they were the top four clubs, and in the current 2006–2007 season, they once again occupy the top four spots.⁸³ Similarly, in Italy's Serie A, three clubs—Juventus, Inter Milan, and AC Milan—have finished in the top four spots in each of the past four seasons—finishing in the top three in three of those four seasons.⁸⁴ In Germany, Bayern Munich has won the championship three out of the last four years, finishing second in 2003–2004.⁸⁵ In France, Lyon has been champion for four straight seasons, and is currently the leader in the 2006–2007 season.⁸⁶ Finally, in Holland, PSV Eindhoven has been

82. *Id.* at 171. It should be noted that the 2001 rule changes do not apply to amicable transfers. Thus, when the player, and both the selling and purchasing club agree on a transfer fee, large sums will continue to change hands regardless of a player's age. *See* Irving, *supra* note 10, at 724.

83. *See* ESPN SoccerNet—Premiership Standings—2006/07, <http://soccer.net.espn.go.com/tables?league=eng.1&season=2006&column=none&order=false&cc=5901>, (for 2005/06 standings follow “2005/06” hyperlink; for 2004/05 standings follow “2004/05” hyperlink; for 2003/04 standings follow “2003/04” hyperlink; for 2002/03 standings follow “2002/2003” hyperlink) (last visited Jan. 25, 2007).

84. In the final standings from the 2005/06 Serie A season, Juventus and AC Milan do not appear in the top two spots (though they finished with the two best records) due to penalties the league assessed for their involvement in a match-fixing scandal. The extent to which their respective records were due to their underhanded arrangement rather than their play on the field will never be known. *See* ESPN SoccerNet—Italian Serie A Standings—2005/06, <http://soccer.net.espn.go.com/tables?league=ita.1&season=2005&column=none&order=false&cc=5901>, (for 2004/05 standings follow “2004/05” hyperlink; for 2003/04 standings follow “2003/04” hyperlink; for 2002/03 standings follow “2002/2003” hyperlink) (last visited Jan. 25, 2007).

85. *See* ESPN SoccerNet—German Bundesliga Standings—2005/06, <http://soccer.net.espn.go.com/tables?league=ger.1&season=2005&column=none&order=false&cc=5901>, (for 2004/05 standings follow “2004/05” hyperlink; 2003/04 standings follow “2003/04” hyperlink; for 2002/03 standings follow “2002/2003” hyperlink) (last visited Jan. 25, 2007).

86. *See* ESPN SoccerNet—French Ligue 1 Standings—2006/07, <http://soccer.net.espn.go.com/tables?league=fra.1&season=2006&column=none&order=false&cc=5901>, (for 2005/06 standings follow “2005/06” hyperlink; for 2004/05 standings follow “2004/05” hyperlink; 2003/04 standings follow “2003/04” hyperlink; for 2002/03 standings follow “2002/2003” hyperlink) (last visited Jan. 25, 2007).

champion three of the last four seasons, finishing second in 2003–2004, and is in first place in 2006–2007.⁸⁷

Additionally, in the last few years, clubs have challenged or set records for unprecedented winning, underscoring how dominant the elite clubs currently are. In Italy, Juventus set a record by starting the 2005–2006 season with nine consecutive wins.⁸⁸ In the 2003–2004 season, Arsenal did not lose a single game in the entire thirty-eight-game English season, finishing with twenty-six wins and twelve draws.⁸⁹ Finally, Chelsea started the 2005–2006 season with nine consecutive victories in England, and went unbeaten in forty straight league games dating back to the previous season.⁹⁰

Such complete lack of parity has clearly had a negative effect on the sport. A recent Italian match between giants Juventus and Inter Milan drew a crowd of less than half the capacity of Juventus' home stadium in Turin.⁹¹ This has caused the president of Italy's national association to call for a reduction in ticket prices.⁹² England's Premier League is facing similar problems, and has drawn up a working group to deal with dwindling crowds.⁹³ A member of the working group has pointed to "predictable results" as a possible cause for the attendance drop.⁹⁴ So extreme is the lack of balance in England that seven matches into the 2005–2006 season an Irish betting agency had already declared Chelsea the winner of the league with thirty-one matches left to play, and began paying out on single bets made on the defending champions.⁹⁵ Clearly something must be done to impose balance among clubs and restore uncertainty as to results—something to make football matches meaningful again. But what?

87. See ESPN SoccerNet—Dutch Eredivisie Standings—2006/07, <http://soccer.net.espn.go.com/tables?league=ned.1&season=2006&column=none&order=false&cc=5901>, (for 2005/2006 standings follow "2005/2006" hyperlink; for 2004/05 standings follow "2004/05" hyperlink; 2003/04 standings follow "2003/04" hyperlink; for 2002/03 standings follow "2002/2003" hyperlink) (last visited Jan. 25, 2007).

88. *Serie A: Juventus Set New Record with Victory*, REUTERS (Rome), Oct. 26, 2005, <http://soccer.net.espn.go.com/news/story?id=347197&cc=5901>.

89. See *Premiership Standings—2003/04*, <http://soccer.net.espn.go.com/tables?league=ENG.1&season=2003&column=none&order=false&cc=5901>.

90. See *Proud Mourinho "Not Afraid of the Future"*, Nov. 6, 2005, <http://soccer.net.espn.go.com/news/story?id=348464&cc=5901>.

91. See *Juventus Deserve Bigger Crowds Says Moggi*, *supra* note 16.

92. *Italian Clubs Need to Cut Prices*, REUTERS (Rome), Oct. 5, 2005, <http://soccer.net.espn.go.com/news/story?id=344995&cc=5901>.

93. See *Premier League Probes Crowd Slump*, *supra* note 16.

94. *Id.*

95. *Bookmaker Pays Out on Chelsea Title Victory*, REUTERS (London), Sept. 29, 2005, <http://soccer.net.espn.go.com/news/story?id=344274&cc=5901>.

III. A SOLUTION PROPOSED: THE SALARY CAP

In September of 2005, after watching Chelsea dominate league play over the last season and a half of the Premier League, a small-market club chairman, Dave Whelan of Wigan Athletic, publicly announced the need for a salary cap to restore meaningful competition to the league.⁹⁶ He went on to claim that four other club executives would support a cap,⁹⁷ and later claimed that elite clubs Arsenal and Manchester United would possibly support one as well.⁹⁸ Shortly thereafter, Whelan proved to be correct when Arsene Wenger, the manager of Arsenal, went public with his support for salary restrictions.⁹⁹ But perhaps the clearest sign that European football is ready to consider salary limits came in the form of an article written by Joseph Blatter, the president of FIFA. In it, Blatter claims that European football has become a “society of haves and have nots,” and hints at setting limits on player salaries.¹⁰⁰ Blatter concludes by announcing that he has commissioned a FIFA task force to deal with the excessive spending that is “suffocating” the game.¹⁰¹

96. Harris, *supra* note 17.

97. *Id.*

98. Gordon Tynan, *Arsenal and United May Back Cap, Says Whelan*, INDEPENDENT (U.K.), Sept. 23, 2005, <http://sport.independent.co.uk/football/news/article314430.ece>. While Whelan was expressing support for a salary cap in England’s Premier League, in order for a cap to be successful it would probably have to be implemented by UEFA and apply to all of Europe. A cap in one European country alone would result in a movement of top players from that country to other countries whose leagues do not have a salary cap and can thus offer higher salaries. Furthermore, this phenomenon could easily be characterized as affecting trade between Community member states, and thus European competition law would still likely apply. *See infra* note 135 and accompanying text. As a result, though this Note considers a salary cap for all of European football, its basic inquiry would be equally relevant to a salary cap in one European country.

99. *Wenger Supports Top-Flight Salary Limit*, Oct. 15, 2005, <http://soccornet.espn.go.com/news/story?id=345966&cc=5901>.

100. Joseph Blatter, *Greed Threatens the Beautiful Game*, FIN. TIMES (U.K.), Oct. 12, 2005, at 19.

101. *Id.* Interestingly, these recent calls for salary caps are not the first time restrictions on player salaries have been considered by European football. In 2002, an organization of eighteen of the most powerful clubs in Europe known as G-14 agreed on a “cost control” measure whereby G-14 clubs would not spend more than 70% of their total revenue on player salaries. *See Top Clubs Agree Salary Cap*, BBC SPORT (U.K.), Nov. 5, 2002, <http://news.bbc.co.uk/sport1/hi/football/europe/2402329.stm>. Though the media referred to it as a “salary cap,” the agreement only applied to G-14 members. Furthermore, the agreement was a response to the widespread financial problems clubs were facing at the time—it was not meant to foster competitive balance. *See id.* Effectively, the G-14 agreement has been replaced by UEFA’s licensing system which includes financial criteria also aimed at ensuring that clubs are solvent and credible, rather than dealing with issues of competition. *See* UEFA, *UEFA Club Licensing System Manual* at 82, March,

Though it is not clear what solutions FIFA's task force may suggest, based on success in other sports¹⁰²—particularly league sports here in the United States¹⁰³—a salary cap would be an effective mechanism for revitalizing European football's lacking competition.¹⁰⁴ All four major pro-

2002, <http://www.uefa.com/newsfiles/22395.pdf>. Nothing in the licensing system restricts the amount of money a club can spend on players. *See id.* at 81–161.

For more information on the G-14, *see* G-14, Who We Are, <http://www.g14.com/main.php> (follow “Who We Are” hyperlink) (noting that the purpose of G-14 is to give its 18 member clubs a voice in the development of international club football) (last visited on Jan. 25, 2007); G-14, Who We Are—Basics, <http://www.g14.com/main.php> (follow “Basics” hyperlink) (noting that the G-14 is mainly concerned with issues of “EC employment legislation, sponsorship and TV rights, intellectual copyright, format and management of club and national team competitions”) (last visited Jan. 25, 2007).

102. It is perhaps surprising to learn that salary caps are in effect in other sports within Europe. Several rugby leagues within Europe, including the Zurich Premiership, French rugby, and the Super League have salary caps ranging from £1.7 million to £2.25 million per season. Additionally, in European football, lower English divisions—League One and League Two—have voluntary salary caps whereby clubs refrain from spending more than 60% of their total revenue on player salaries. Richard Mooney & Marjorie Holmes, *A Question of Sport: Does US Treatment of Football Offer Any Solutions for the UK?*, COMPETITION L. INSIGHT, Aug. 9, 2005, at 7; Harris, *supra* note 17. The reason that such leagues have caps and have not been investigated by the EC is that they draw media attention and engage in economic activity on a much lower scale than does football at its highest national divisions. As such, a salary cap in European football's “top-flight” would surely draw the attention of the EC. *See* Mooney & Holmes, *supra*.

103. Salary caps in U.S. league sports do not conflict with U.S. antitrust law because in the United States, unlike in Europe, contracts between leagues and players are collectively bargained by the league and players' unions. The National Labor Relations Act provides that a majority of employees in a unit may elect a representative of all employees in such unit for purposes of collective bargaining. 29 U.S.C. § 159 (1959). Salary caps that are included in collective bargaining agreements (CBAs) have been deemed permissible since invalidating a cap in such cases would unravel the entire CBA, and ultimately frustrate the purpose of collective bargaining. *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961–62 (2d Cir. 1987).

104. Taking U.S. league sports as our model once again, there are policies other than the salary cap that are widely used to promote competitive balance. One such alternative is revenue sharing. Revenue sharing plans generally require teams to put a limited amount of their local revenue into a league pool which is then distributed so that revenues are channeled to teams with below league-average revenues. Major League Baseball (MLB), the National Football League (NFL), and the National Hockey League (NHL) all have revenue sharing plans. *See* MLB, 2003–2006 Basic Agreement, Sept. 30, 2002, art. XXIV, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB CBA]. On November 10, 2006, shortly before publication of this Note, MLB and the players association (MLBPA) came to terms on a new CBA that will be in effect for the 2007–2011 seasons. *See* Press Release, MLB, MLB, MLBPA Reach Five-Year Labor Accord (Nov. 24, 2006), available at http://mlb.mlb.com/NASApp/mlb/news/press_releases/press_release.jsp?ymd=20061024&content_id=1722380&vkey=pr_mlb&f

ext=.jsp&c_id=mlb (As of the publication of this Note, the MLB 2007–2011 CBA has not been made publicly available by MLB. Therefore, for purposes of this Note, reference will be made to the MLB 2003–2006 CBA which is no longer in effect. All of the portions of the MLB 2003–2006 CBA that are discussed herein, including the competitive balance tax, revenue sharing, and the amateur draft, are still in effect under the MLB 2007–2011 CBA, though some changes to each policy have been made.); NFL, *Collective Bargaining Agreement Between the NFL Management Council and the NFL Players' Association*, Mar. 8, 2006 (as amended), art. XXIV, § 11, available at http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf [hereinafter NFL CBA]; NHL, *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, July 22, 2005, art. 49, available at <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA]. However, revenue sharing in the United States is fostered by the strength of professional leagues, and the close relationship between teams and players as evidenced by collective bargaining. As leagues in Europe tend to be looser unions—thus the system of promotion and relegation—where clubs are more independent of one another, revenue sharing is not likely to prove workable. Furthermore, revenue sharing is in some ways more extreme than a salary cap insofar as a cap limits a team's spending, while revenue sharing actually takes a piece of an owner's profits and redistributes it. Given the financial troubles European football is currently experiencing, the few owners that do turn a profit would be unlikely to agree to a policy that takes a cut of their profit and gives it to a competing club. That said, in Europe, broadcast rights to live football matches are generally sold "collectively" by the league, which then distributes the proceeds amongst the clubs. This can be seen as a form of revenue sharing. This practice is often referred to as "collective selling" or "joint selling." Unfortunately for those who stress competitive balance on the field, joint selling is largely frowned upon by the EC as anti-competitive off the field since it limits media coverage of live matches, and prevents clubs from competing in the sale of rights to matches (oh, the irony!). See IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 1441–43 (4th ed. 2005) for a discussion of the EC's views on joint selling.

Another alternative balancing mechanism to a salary cap employed by U.S. leagues is the player draft. Drafts regulate how new players enter a league, and are generally weighted so that the order in which teams draft is directly related to performance from the prior season. Poorly performing teams are allowed to draft ahead of better performing teams, meaning they can select (and thus control) the top talents entering the league. The system thus promotes competitive balance. See Lewis et al., *supra* note 8, at 855–56. MLB, the NBA, the NFL, and the NHL all have player drafts. See MLB CBA, *supra*, Attachment 24, at 202; NBA, *Collective Bargaining Agreement*, art. X, July 29, 2005, available at http://www.nbpa.com/cba_articles.php [hereinafter NBA CBA]; NFL CBA, *supra*, art. XVI; NHL CBA, *supra*, art. 8. By contrast, in European football, new players can be contracted by any club, and thus often sign with the highest bidder. Since the clubs with the most money to offer are often the clubs that traditionally win, this practice fosters a competitive imbalance. Still, it is unlikely that a player draft could be instituted in Europe without a major reorganization of European football. Unlike U.S. league sports, the market for players in European football spans multiple leagues in multiple countries. Organizing one draft for all of Europe is impractical, while organizing a draft in only one or two leagues would likely motivate young players to play in leagues that do

fessional sports leagues in the United States¹⁰⁵ have some form of salary cap or cap-like policy in their current collective bargaining agreements (CBA).¹⁰⁶ Of those four leagues, there is perhaps no better example of how the salary cap can balance competition, and in turn enhance the popularity and profitability of a sport, than the NFL. In the twenty-one-year period from 1972–1993, seven of the twenty-eight¹⁰⁷ NFL franchises won the Super Bowl a combined total of twenty times, making the NFL a league of dynasties.¹⁰⁸ Since the NFL instituted the salary cap in 1993,¹⁰⁹ nine different teams have won the thirteen Super Bowls.¹¹⁰ During the “salary cap era” the NFL has become the most profitable sport in the United States,¹¹¹ and, to the enjoyment of many fans, has also become synonymous with parity.

not have drafts where they are free to sign with the highest bidder, and have some control over where they play.

Since these alternative methods of promoting competitive balance do not seem practical for European football to adopt, this Note only considers mechanisms that limit spending on player salaries such as a salary cap.

105. They are Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL).

106. MLB has a “competitive balance tax”. See MLB CBA, *supra* note 104, art. XXIII. Note that the “competitive balance tax” remains a part of the current MLB 2007–2011 CBA. See Press Release, MLB, MLBPA Reach Five-Year Labor Accord, *supra* note 104. The NBA, NFL, and NHL all have salary caps. See NBA CBA, *supra* note 104, art. VII; NFL CBA, *supra* note 104, art. XXIV; NHL CBA, *supra* note 104, art. 50, § 50.5.

107. From 1972–1976 there were twenty-six NFL teams. In 1976 the Seattle Seahawks and Tampa Bay Buccaneers were added to the league, and from 1976–1993 there were twenty-eight NFL teams. Currently, the NFL has thirty-two teams after expansion in 1995, 1999, and 2002. See Chronological History of the Modern National Football League, <http://www.vaughantech.com/nfl.html> (last visited Jan. 26, 2007).

108. The Cowboys (three), Dolphins (two), 49ers (four), Giants (two), Raiders (three), twice in Oakland and once in Los Angeles), Redskins (three), and Steelers (four) won all but one Super Bowl from 1972–1993. The Bears in 1985 were the only team to win once and never repeat. See Super Bowl Recaps, <http://www.superbowl.com/history/recaps> (last visited Jan. 26, 2007).

109. See Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1625 (2004).

110. Only the Broncos (twice), Cowboys (twice), and Patriots (three times) have won the Super Bowl more than once since the salary cap was introduced. See Super Bowl Recaps, *supra* note 108.

111. In 2003, the thirty-two NFL teams had a combined operating cost of \$851 million and revenue of \$5.3 billion. See Michael K. Ozanian, *Football Fiefdoms*, FORBES.COM, Sept. 3, 2004, available at http://www.forbes.com/business/2004/09/02/cz_kb_0902 nflintro.html. In 2005, the average NFL team was valued at \$898 million compared with \$376 million in baseball. See Kurt Badenhausen, Michael K. Ozanian, & Maya Roney, *The Tape on Tagliabue*, FORBES.COM, Sept. 1, 2006, available at <http://www.forbes.com/>

The basic idea of a salary cap is rather simple: limit the amount of money a team can spend on player salaries.¹¹² However, in U.S. leagues, salary caps are often complex policies that reflect the profitability of the sport, as well as the balance of power between the league and the players' union, and thus vary from league to league. This Note will consider two types of salary caps as possible solutions for European football: the "hard cap" and the "luxury tax."¹¹³ The NFL institutes a so-called hard cap, whereby no team can spend more than the designated limit on total player salary at any time.¹¹⁴ The hard cap is the most restrictive form of team salary cap,¹¹⁵ and the most effective at striking competitive balance. It completely separates financial resources from success on the field.

A luxury tax, by contrast, is technically not a salary cap, but a cap-like restriction, since it does not impose an absolute ceiling on player salary.

2006/08/31/paul-tagliabue-nfl_cz_mo_06nfl_0831nflintro.html; Michael K. Ozanian, *The Business of Baseball*, Forbes.com, Apr. 20, 2006, available at http://www.forbes.com/2006/04/17/06mlb_baseball-teamvaluationscx_mo_0420sports.html.

112. In U.S. sports leagues, the designated limit that a team can spend is usually equal to a percentage of the average team revenue. By contrast, those who have talked about having a cap in Europe often support an agreement whereby each club will not spend more than a fixed percentage of its own revenue as opposed to the average revenue. See *Wenger Supports Top-Flight Salary Limit*, *supra* note 99; *Top Clubs Agree Salary Cap*, BBC SPORT (U.K.), *supra* note 101. It is easy to see how such an agreement is self-serving of big-market clubs and would do little to effectively create a competitive balance. A limited percentage of the revenue of big-market clubs, which tend to take in more revenue, will almost always afford them much greater spending room than that same percentage of revenue of small-market clubs.

113. This Note does not consider other types of caps, including the "soft cap." Soft caps set a limit on spending, however, teams are allowed to spend over that limit to some extent. The NBA has a soft salary cap whereby teams can use league-approved "cap exceptions" to spend over the cap limit. See NBA CBA, *supra* note 104, art. VII, § 6. The NBA allows nine exceptions which teams often use. Soft caps are not considered here because they generally require defined situations when a team is allowed to spend over the cap limit, and the policy considerations required to define such cases in European football are beyond the scope of this Note.

114. See NFL CBA, *supra* note 104, art. XXIV, § 4; *id.* art. XXV.

115. A distinction can be made between "individual caps," which limit the amount of money a team can pay an individual player, and "team caps," which limit the amount of money a team dedicates to total player salaries. Both the NBA and NHL have individual as well as team salary caps. See NBA CBA, *supra* note 104, art. VII, § 5; NHL CBA, *supra* note 104, art. 50, § 50.6. Individual player caps are more restrictive than team salary caps since under a team cap there is no limit as to what a team owner can pay an individual player so long as the amount paid on total player salaries does not exceed the cap limit. Since an individual cap accomplishes a similar end, yet is more restrictive than a team cap, it is more likely to be struck down by European competition law, and thus individual caps are not considered here.

Under MLB's luxury tax system, a spending threshold is set, and teams can choose to spend over the threshold, but will be taxed a fixed percentage for every dollar so spent.¹¹⁶ Such policies keep spending lower, but do not totally restrict owners' freedom to spend, and thus bigger market teams will still usually maintain a slight advantage.

Though it seems that a salary cap (hard cap or luxury tax) can effectively deal with European football's lack of competitive balance, and there is support for such a measure among prominent figures within the sport, doubts remain as to whether the EC would view a salary cap as a violation of European competition law.¹¹⁷ The next two parts of this Note explore this question. Part IV will review relevant European law, while Part V will apply the law to both a hard cap and a luxury tax, and contrast outcomes.

IV. EC COMPETITION LAW AND SPORTS

A. Articles 81 and 82

Articles 81 and 82 of the EC Treaty govern competition in pan-European markets. We will first examine Article 82, which prohibits abuse of a dominant position within the European market that may affect trade between member states.¹¹⁸ Then we will take up the more complex

116. See MLB CBA, *supra* note 104, art. XXIII, § B. Interestingly, MLB has named its luxury tax the "competitive balance tax." The tax proceeds are used by the league to pay for player benefits, to fund projects to promote baseball in developing countries and areas where baseball is not widely played, and to reinforce MLB's Industry Growth Fund. See MLB CBA, *supra* note 104, art. XXIII, § H.

117. This concern is based on the fact that European football clubs are competitors in the market for players, and thus a salary cap would be seen as an agreement among competitors.

118. Article 82 reads as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

EC Treaty, *supra* note 11, art. 82. For a comprehensive explanation of Article 82 of the EC Treaty, see VAN BAEL & BELLIS, *supra* note 104, at 115–32.

Article 81. Case law defines “dominant position” under Article 82 as “a position of economic strength enjoyed by an undertaking¹¹⁹ which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”¹²⁰ In *Bosman*, Advocate General Lenz, in his advisory opinion,¹²¹ applied Article 86 of the Treaty of Rome¹²² to the transfer system.¹²³ Ultimately Lenz concluded that the transfer system did not violate Article 86 because it restricted competition between clubs insofar as they can contract players, and players are not “competitors, customers or consumers” in relation to clubs.¹²⁴ Similarly, a salary cap is a restriction of competition between clubs in the market for players, and since it would not affect the relationship between clubs and “competitors, customers or consumers,” it follows that there would be no violation of Article 82 of the EC Treaty.

The real challenge to the legality of a salary cap in European football comes from Article 81, which prohibits agreements between undertakings that restrict competition and affect trade between member states.¹²⁵

119. For purposes of Articles 81 and 82, an “undertaking” is defined quite broadly as “every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.” See Case C-41/90, *Höfner & Elsnher v. Macrotron GmbH*, 1991 E.C.R. I-1979, ¶ 21.

120. Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207, ¶ 65.

121. Recall that as part of the structure of the ECJ, Advocate Generals provide “advisory opinions” to the court before it rules on novel issues. See *supra* note 11.

122. Article 86 of the Treaty of Rome is now embodied in Article 82 of the EC Treaty. See *supra* note 51.

123. *Bosman*, 1995 E.R.C. at I-5036–I-5039.

124. *Id.* at I-5038–I-5039.

125. Article 82 reads as follows:

The following shall be prohibited as incompatible with the common market: 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 common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. 2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void. 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:—any agreement or category

Article 81 accomplishes its purpose in three parts: 81(1) lays out conduct that is prohibited as anti-competitive; 81(2) renders conduct that falls within 81(1) automatically void; and 81(3) sets forth requirements for exemptions to Article 81.¹²⁶ Articles 81(1) and 81(3) are somewhat complex and for purposes of this Note, they will be broken down into their general material requirements.¹²⁷

The “agreements” prohibited by 81(1) are broadly interpreted so as to encompass any joint intention of undertakings regarding specific conduct in a market.¹²⁸ In addition to agreements between undertakings, anti-competitive decisions made by “associations of undertakings”¹²⁹ are also prohibited by 81(1).

Agreements fall within 81(1) only if they prevent, restrict, or distort competition.¹³⁰ Agreements can prevent, restrict, or distort competition by either their object,¹³¹ or effect.¹³² Furthermore, 81(1) only applies if

of agreements between undertakings;—any decision or category of decisions by associations of undertakings;—any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EC Treaty, *supra* note 11, art. 81.

126. *See id.*

127. Because of the complexity of Article 81 and its case law, it is difficult to present in the concise fashion required by this Note. What follows is a simple outline of the material terms of Articles 81(1) and 81(3). Footnotes are included to further qualify these terms. The narrow purpose of this outline is to provide a basic framework for the analysis that follows, and nothing more. For a more complete discussion of Article 81 see VAN BAEL & BELLIS, *supra* note 105, at 27–113.

128. Case T-1/89, Rhône-Poulenc v. Commission, 1991 E.C.R. II-867, ¶ 120.

129. “Associations of undertakings” are essentially groups of undertakings acting in concert through an intermediary organization rather than through direct agreements. “Associations” include bodies entrusted with statutory functions. *See* Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten, 2002 E.C.R. I-1577, ¶¶ 50–71. Furthermore, associations of undertakings can be regarded as undertakings themselves, insofar as they engage in economic activity. *See Bosman*, 1995 E.R.C at I-5027.

130. *See supra* note 125.

131. Agreements which restrict competition by object are:

those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market.

the ultimate effect of the restriction on competition is “appreciable.”¹³³ Additionally, this appreciable restriction must affect a defined common market.¹³⁴ Finally, it must not be forgotten that Article 81 only applies to agreements that affect trade between member states.¹³⁵

Agreements within Article 81(1) are automatically voided by Article 81(2), unless they qualify for an exemption under 81(3). Article 81(3) allows agreements to stand if their pro-competitive benefits outweigh their restrictive effects.¹³⁶ An agreement must satisfy four conditions in

See European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 O.J. (C 101) 97, 100.

132. If an agreement is not restrictive of competition by object, its effect may restrict competition if it “affect[s] actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability.” *See id.*

133. Although the requirement of an appreciable effect on competition is not included in the text of 81(1), it is formalized in the Commission’s *De Minimis* Notice of 2001. Accordingly, an agreement between actual or potential competitors will not be deemed to *appreciably* restrict competition if the aggregate market share held by the parties to the agreement does not exceed 10%. Such agreements will not be caught by 81(1). *See* European Commission, Commission Notice on Agreements of Minor Importance Which Do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (*De Minimis*), 2001 O.J. (C 368) 13.

134. Defining relevant markets requires a two-part analysis—defining the relevant product market, and defining the relevant geographic market. Defining the relevant product market involves assessing “all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.” Defining the relevant geographic market involves assessing “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.” *See* European Commission, Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) ¶¶ 7–8.

135. Establishing an effect on trade between member states involves three elements—the concept of “trade,” establishing “effect,” and establishing that the effect is appreciable (note, this third analysis is independent of the finding that an agreement works an “appreciable” restriction of competition). “Trade” is defined broadly to include “all cross-border economic activity.” European Commission, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81, 83. Establishing an “effect” requires that “it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement or practice may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.” *Id.* Appreciability is a fact-sensitive inquiry that considers “the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned.” *Id.* at 85.

136. *See* European Commission, Guidelines on the Application of Article 81(3) of the Treaty, *supra* note 131, at 102.

order to qualify for an exception under Article 81(3).¹³⁷ The first condition is that the agreement must create efficiency gains by improving production or distribution of goods or services, or by promoting technical or economic progress.¹³⁸ The second condition requires that a fair share of the benefits created by the agreement be passed on to consumers.¹³⁹ The third condition under 81(3) is that the restrictions must be indispensable to achieving the efficiencies created.¹⁴⁰ Lastly, under the fourth condition of 81(3), the agreement in question cannot afford the parties the opportunity to eliminate “competition in respect of a substantial part of the products concerned.”¹⁴¹

B. Competition Law and Sports

In the years after the *Bosman* decision, as the EC sharpened its focus on European football and sports in general, it recognized that the application of competition law must take into account certain characteristics that are unique to sports. The EC is not concerned with regulations that are essential to a sport. If the regulation in question is inherent to a particular sport, its organization, or the organization of competitions within that sport, so that without such a regulation the sport would not be able to exist, the regulation will not fall within Article 81(1) regardless of its restrictive effect on competition.¹⁴² Thus, if the hard cap or the luxury tax is determined to be essential to European football, Article 81(1) will

137. *Id.*

138. Only objective benefits to the market are measured in applying the first condition. Specifically, the Commission will take into account the nature of the claimed efficiencies; the causal link between the agreement and the efficiencies; the likelihood and magnitude of the claimed efficiencies; how and when each of the claimed efficiencies would be achieved; and any costs incurred in achieving the efficiencies. *See id.* at 104–05.

139. “Consumers” under 81(3) are the customers of the parties to the agreement in question. *See id.* at 109.

140. This condition functions as a least restrictive means test, whereby there cannot be any other economically practical and less restrictive means of creating the same efficiencies. However, it is important to note that the Commission holds that it will not question the business judgment of the parties by analyzing hypothetical or theoretical alternatives. Rather, the Commission will only intervene under this condition where it is reasonably clear that other realistic and attainable alternatives are available. *See id.* at 107–08.

141. Determining whether competition is eliminated depends on the degree of competition prior to the agreement, and on the degree to which competition is reduced by the agreement. *See id.* at 113. “Competition” for purposes of this final condition of Article 81(3) is referring to competitors in the industry, who are *not* a party to the agreement in question.

142. *See* Mario Monti, European Comm’r for Competition, Competition and Sport, Address at the Rules of the Game Conference (Feb. 26, 2001), available at <http://www.governance-in-sport.com/GIS%20doc.pdf>.

not apply. The EC applied this test in dismissing a complaint against UEFA in 2002. ENIC, a company that owned controlling interest in five European football clubs, petitioned the EC under Article 81 to strike down a UEFA rule that prohibited one company from owning more than one club in UEFA competitions.¹⁴³ The EC found that though the rule had a restrictive effect, such effects were “inherent in the pursuit of the very existence of credible pan European football competitions.”¹⁴⁴ Since the rule was necessary and proportionate to the need to maintain the public’s perception that UEFA competitions were genuine, and without such a perception long-term competition would prove impossible, the rule fell outside Article 81(1).¹⁴⁵

The EC has also recognized that competition in sports is different from competition in other industries. In sports, it is not within a competitor’s economic interest to put other competitors out of business, rather competition is necessary for the very existence and success of sports.¹⁴⁶ This means that some interdependence among competitors is inherent in sports.¹⁴⁷ Furthermore, as the ECJ concluded in *Bosman*, the EC has recognized the need to preserve uncertainty as to results and to maintain a degree of equality among competitors as legitimate aims that are essential to sports.¹⁴⁸

V. ANALYSIS

The following analysis considers the legality of a UEFA-implemented hard salary cap, and a UEFA-implemented luxury tax in light of Article 81. It is, to some extent, unnatural to consider both policies since UEFA

143. European Commission, Case COMP/37 806: ENIC/UEFA, 2002.

144. The Commission found that without such a rule, two clubs with one owner could be forced to play each other in UEFA competitions. As a result, fans could lose confidence in the honesty of the competition, and ultimately lose interest which would devalue the sport. *Id.* ¶ 32.

145. *Id.* ¶ 38. Though the EC has held that this inquiry is unique to sports, the underlying logic does extend to virtually all sectors. If an industry cannot exist without certain restrictions on competition, those restrictions must be allowed to stand. See Wouters, 2002 E.C.R. at ¶¶ 73–110, where the ECJ held that a prohibition by the Dutch Bar on partnerships between bar members and other professions (including accountants) did not fall within Article 81(1) because it was reasonable to conclude that such a regulation was necessary for the proper practice of law within the Netherlands.

146. By contrast, in almost all other industries, it is within an undertaking’s interest to eliminate weaker competition and take over their market share. See Monti, *supra* note 142.

147. See *id.*

148. See European Commission, *The Helsinki Report on Sport*, at ¶ 4.2.1.3, COM (1999) 644 final, (Dec. 10, 1999), reprinted in RICHARD PARRISH, SPORTS LAW AND POLICY IN THE EUROPEAN UNION 243, 248.

is likely to adopt one or the other, but not both.¹⁴⁹ The EC would then review the legality of whichever policy UEFA chose to implement.¹⁵⁰

Insofar as the analysis of the hard cap and the luxury tax overlap, they are analyzed together in order to avoid redundancy. For the most part, however, they are considered separately. The first part of the analysis applies Article 81(1), and considers whether the hard cap or the luxury tax can be characterized as essential to European football and thus fall outside of Article 81(1). The second part applies Article 81(3), and the third part offers additional considerations.

A. Article 81(1)

Both a UEFA hard cap and a luxury tax would satisfy many of the requirements of Article 81(1). UEFA is an “association of associations of undertakings.”¹⁵¹ Therefore a hard cap or luxury tax imposed by UEFA would be a decision by an association of associations of undertakings within the meaning of Article 81(1).

149. Although it is likely that UEFA itself would conduct an analysis similar to ours as it must assess the legality of all policies that it considers adopting.

150. On May 1, 2004, the procedure for implementing European competition law was revised. New procedures give competition authorities of member states, national courts of Community member states, and the EC the power to implement Articles 81 and 82. *See* Council Regulation (EC) No. 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down Under Articles 81 and 82 of the Treaty, 2003 O.J. (L1) 7–9. Prior to these changes UEFA would have been able to notify the EC that it adopted a luxury tax or a hard cap, and request that the EC review the legality of its action thereby securing temporary immunity from fines even if the EC determined that the policy in question violated competition law. Now, however, notifications are no longer possible, and UEFA must assess the legality of its actions at the risk of being fined for violations of competition law. *See* VAN BAELE & BELLIS, *supra* note 104, at 1024–25. Notwithstanding these rule changes, it is likely that the EC and not national courts or national competition authorities would review UEFA actions because they often affect many member states. *See id.* at 1026–27.

151. *See* ENIC/UEFA, *supra* note 143, ¶ 25. Professional clubs are undertakings insofar as they engage in economic activity. National associations which group clubs together are associations of undertakings. Thus, UEFA, which groups together national associations within Europe, is an association of associations of undertakings.

Both a hard cap and a luxury tax are forms of horizontal¹⁵² agreements that typically fall within 81(1) because they restrict competition in either object or effect. While UEFA could argue that the narrow object of a hard cap or a luxury tax is to improve competitive balance within European football, it would have to concede that the effect of such regulations restricts competition in the market for players. In the case of a hard cap, a club that is at or near the spending limit would not be able to compete with other clubs for the services of any player whose salary would bring the club above the limit. In the case of a luxury tax, a club that is at or near the tax threshold, though free to compete for the services of players, will be taxed for taking on salary in excess of the threshold, and thus competition is at least distorted, if not inhibited.

Clearly the market for players is one of the relevant markets affected by a hard cap or luxury tax. This market represents the “upstream” market where clubs compete to purchase players’ services which are necessary for the finished product: a football match. However, the market for players is not the only relevant market under 81(1) analysis. The “downstream” selling market where football is sold to spectators, media, and other consumers, would also be affected.¹⁵³ This market would benefit from an improved product—more competitively balanced football with less predictable results—as a result of a salary cap or luxury tax. The effect of a UEFA hard cap or luxury tax on both the upstream market for players and the downstream selling market is sure to be appreciable since clubs organized under UEFA represent 100% of the professional European football market.¹⁵⁴

Finally, a hard cap or luxury tax would certainly affect trade between member states. One example of such an effect can be seen in situations where clubs from one member state transfer players to clubs in other member states. Under a hard cap, a club from one member state will not be able to transfer a player to a club in another member state if the salary

152. “Horizontal” agreements are agreements entered into by companies “operating at the same level(s) in the market.” See European Commission, Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, 2001 O.J. (C 3) 2. A hard cap or luxury tax would be an agreement among clubs, with all clubs operating at the same level within the market for European football—all clubs are buyers in the sense that they have to contract players, a stadium, etc., and sellers in that they participate in matches and competitions, to which they can sell tickets, broadcast rights, etc.

153. For a description of the process of defining relevant markets, and use of the terms “upstream” and “downstream” markets, see VAN BAEL & BELLIS, *supra* note 104, at 143–44.

154. Indeed, UEFA has been accused of operating as a monopoly in professional European football. See, e.g., ENIC/UEFA, *supra* note 143, ¶ 15.

of the player being transferred would raise the transferee club's payroll above the spending limit. In the case of a luxury tax, while a transfer could go through even if the transferee club's payroll would exceed the tax threshold, the transferee club would be taxed, and possibly refrain from such a transfer as a result.

Thus far, both a UEFA hard cap and a UEFA luxury tax would fall within Article 81(1). However, it is still necessary to consider whether such restrictions can be characterized as inherent to European football. The decisive question is this: can European football, particularly national competitions, continue to exist in the long term without a hard cap or a luxury tax? If the answer is yes, then 81(1) will apply and we must continue our analysis by applying 81(3). However, if the answer is no, then 81(1) will not apply, the restrictions will be consistent with competition law, and our inquiry will end.

The basic argument that some restriction on player salary is necessary to the long-term existence of European football can be used to defend either a hard cap or a luxury tax. UEFA can claim that without such restrictions, the lopsided dominance of large-market clubs in recent years¹⁵⁵ will continue. A continued imbalance in competition on the field means that results will remain predictable, and spectators will lose interest in the sport. Ultimately, European football will lose all marketability as spectators, advertisers, and broadcasters all turn away. Essentially, UEFA would be arguing that without restrictions on the upstream market, where clubs purchase players' services, the downstream market, where football matches are sold, would cease to exist. Since the upstream market is dependent on the downstream market, restrictions on competition in the upstream market (a hard cap or a luxury tax) are necessary. This argument is strong in light of the fact that it comports with the EC's reasoning in dismissing ENIC's claim against UEFA,¹⁵⁶ and promotes

155. See *supra* text accompanying notes 83–95.

156. The EC held in relevant part:

Without the UEFA rule, the proper functioning of the market where the clubs develop their economic activities would be under threat, since the public's perception that the underlying sporting competition is fair and honest is an essential precondition to keep its interest and marketability. If UEFA competitions were not credible and consumers did not have the perception that the games played represent honest sporting competition between the participants, the competitions would be devalued with the inevitable consequence over time of lower consumer confidence, interest and marketability. Without a solid sporting foundation, clubs would be less capable of extracting value from ancillary activities and investment in clubs would lose value.

aims that both the EC and the ECJ have recognized as legitimate.¹⁵⁷ However, this argument is too broad, and the EC is sure to push UEFA to justify its choice of one policy over the other. Taking a closer look at a hard cap and a luxury tax separately, each policy has different strengths and weaknesses that the EC would certainly consider, and which it may find dispositive.

Once UEFA establishes that there is a lack of competitive balance in European football and that the consequences are potentially devastating to the sport, it is difficult to argue that a hard salary cap would not substantially benefit the sport. By separating player budget from revenue, a hard cap would effectively redistribute top talent among clubs so that a competitive balance on the field is restored. However, a hard cap is perhaps the most restrictive spending limit employed in professional sports, placing an unconditional ceiling on spending. The EC, which stresses that restraints on competition be proportional to their desired effects,¹⁵⁸ would likely frown on the harshness of a hard cap. As a result, less restrictive policies would be preferred alternatives. UEFA, in defending a hard cap, would be forced to argue that less restrictive policies would not provide enough of a competitive balance to render results unpredictable. However, the hard cap is such an extreme measure, one that would fundamentally alter the balance of power in European football, that the EC would likely have a hard time accepting the argument that without such drastic change the sport could not continue to exist. This is particularly true in light of the fact that less restrictive practices have effectively balanced competition in other sports.¹⁵⁹ Ultimately, because of its restrictive

ENIC/UEFA, *supra* note 143, ¶ 32. Recall that in this decision the EC was considering a UEFA rule prohibiting one entity from owning controlling interest in more than one club participating in the same UEFA competition. Public perception that the clubs participating in a competition are balanced so that the outcome is not entirely predictable is likewise a precondition to continued interest in, and marketability of European football.

157. See *supra* note 146 and accompanying text.

158. Before dismissing ENIC's complaint against UEFA, the EC held that "the rule does not seem to go beyond what is necessary to ensure its legitimate aim. . . ." ENIC/UEFA, *supra* note 143, ¶ 41. Similarly, in *Bosman*, Advocate General Lenz stated in his opinion that only restrictions which are "indispensable" to achieving a legitimate aim fall outside of 81(1). See *Bosman*, 1995 E.C.R. at I-5033.

159. MLB's luxury tax is an obvious alternative. MLB first instituted the luxury tax in the 2002–2006 CBA which recently expired. The tax has coincided with unprecedented parity among MLB teams both economically, and in terms of on-the-field results. In the five years from 2002–2006 that the luxury tax has been in effect, five different teams have won the World Series. See Barry M. Bloom, *MLB, Union Announce New Labor Deal*, MLB.COM, Nov. 10, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20061024&content_id=1722211&vkey=ps2006news&fext=.jsp&c_id=mlb. Furthermore, on the heels of signing a new five-year CBA which extends the luxury tax, players' salaries in

effect on competition, the EC is likely to reject the argument that a hard cap is necessary to European football. As a result, the hard cap is likely to fall within Article 81(1), and will be rendered void unless it qualifies for an exemption under 81(3).

Turning to the luxury tax, its strengths and weaknesses are the inverse of those of the hard cap. Since a luxury tax only penalizes clubs for spending over the tax threshold, and imposes no absolute limits on a club's ability to spend, the EC will not find that it greatly restricts competition. Still, the EC might question the effectiveness of a luxury tax. A luxury tax will allow big market clubs the choice to pay the tax in order to keep top players. If a luxury tax cannot create enough of a competitive balance to fix European football's problem, UEFA cannot claim that it is essential to the economic viability of the sport. However, it is unlikely that the EC would press this issue since defeating the luxury tax for its lack of effectiveness would only encourage UEFA to adopt a more restrictive practice such as the hard cap.¹⁶⁰ The EC is more likely to defer to UEFA's judgment that a luxury tax will balance competition. Assuming that the EC accepts UEFA's basic argument that player salaries need to be restricted, there is a strong possibility that the EC would find that a luxury tax is essential to credible competition in national European football leagues. Thus, a luxury tax would fall outside of Article 81(1). How-

MLB's 2006–2007 free agency period are up an estimated 70% over last year. See Maury Brown, *The Ledger Domain: Why the Free Spending?*, BASEBALL PROSPECTUS, Dec. 4, 2006, <http://www.baseballprospectus.com/article.php?articleid=5741>. Some within baseball have attributed this increase in spending to enhanced parity. See *id.* While it is unclear to what extent the current parity within MLB is attributable to the luxury tax rather than other mechanisms such as revenue sharing, since 2002 only three teams have spent in excess of the tax threshold. See *Yankees and Red Sox Hit with Luxury Tax*, BIZ OF BASEBALL, Dec. 22, 2006, http://www.bizofbaseball.com/index.php?option=com_content&task=view&id=560&Itemid=42. While some argue that this is evidence that the luxury tax is ineffective (since there are some teams that are willing to pay the tax), it is likely that the tax has impacted the spending decisions that large-market teams have made since 2002. See Neil deMause, *Ghosts of 2002*, BASEBALL PROSPECTUS, Dec. 5, 2005, <http://www.baseballprospectus.com/article.php?articleid=4638>.

It is not unlikely that the EC might look to MLB's luxury tax as a possibility since European discussion of sport governance often involves a look across the Atlantic at methods implemented in the United States. See, e.g., Szymanski & Valletti, *supra* note 24, at 2. Furthermore, as far back as 1997 the EC has been aware of the idea of taxing teams that spend over a set amount of money on player salary. See Karel Van Miert, Competition Comm'r, European Comm'n, Sport et Concurrence: Développements Récents et Action de La Commission (Nov. 27, 1997) (transcript in French), available at http://europa.eu.int/comm/competition/speeches/text/sp1997_069_fr.html.

160. Other alternatives such as revenue sharing and a player entry draft have already been dismissed. See *supra* note 104.

ever, for purposes of this Note, we will also apply Article 81(3) to the luxury tax to determine if it might qualify for an exemption in the event the EC would apply Article 81(1).

B. Article 81(3)

Recall that exemptions under Article 81(3) are efficiency-based in that restrictions are allowed to stand if the benefits created outweigh the restrictions on competition. This inquiry not only considers what benefits are created for consumers, but also whether the restrictions in question are the least restrictive means of creating such benefits. Ultimately, 81(3) analysis will mirror the 81(1) analysis,¹⁶¹ and as a result, the respective strengths and weaknesses of a hard cap and a luxury tax considered in 81(1) analysis will remain significant in 81(3) analysis. Our inquiry here is guided by Article 81(3)'s four conditions. The fourth condition—that the restriction in question cannot eliminate competition in respect to the products concerned—can be dismissed outright since it is clear that neither a hard cap nor a luxury tax imposed by UEFA would prevent clubs that are not organized under UEFA from competing in the market for players' services.¹⁶² In considering 81(3)'s first three conditions, the hard cap and the luxury tax will be taken up separately.

In the case of a hard cap, it seems that the first two conditions of an 81(3) exemption will be easily satisfied. Read together, the first two conditions require that a hard cap creates a benefit that is passed on to the customers of the parties to the hard cap agreement. It has been established that a hard cap would limit the amount any club could spend on players in the upstream market. Such limits will improve competitive balance amongst clubs, creating less predictable results, which means a better product is being sold to spectators, advertisers, and media in the downstream market. Thus it seems a hard cap would create an improved

161. The inquiry under 81(3) is slightly narrower in focus than our inquiry under 81(1). Under 81(1), we asked whether a hard cap or luxury tax was necessary for the existence of European football. Under 81(3), we first ask how a hard cap or luxury tax will improve European football, and then ask whether they are necessary to create such efficiencies.

162. This condition is actually moot for purposes of our inquiry since it is principally aimed at protecting competitors that are *not* a party to the agreement in question from being squeezed out of the market. However, in the case of a UEFA hard cap or luxury tax, all professional European football clubs would be a party to the agreement (all professional European football clubs are organized under UEFA) and, therefore, for purposes of this fourth condition, there is no competition to be eliminated. Furthermore, a hard cap and a luxury tax seek to enhance competition between clubs, and do nothing to prevent new clubs from coming into existence.

product¹⁶³ that is being passed on to the consumers, thereby satisfying the first two conditions. However, it is not clear that a hard cap would satisfy the third condition under 81(3). The third condition requires that a hard cap be the least restrictive means of creating the benefit of improved competitive balance and less predictable results. The luxury tax is clearly a less restrictive measure, and one that the EC might consider.¹⁶⁴ While UEFA will not have the burden of proving that a hard cap is necessary to the existence of European football, as it did under 81(1), defending a hard cap under a least restrictive means test is not an easy task. Essentially, UEFA will have to convince the EC that a hard cap instills competitive balance to an extent that less restrictive policies cannot match.¹⁶⁵ Additionally, UEFA will have to argue that the benefit of the extra parity that only a hard cap can yield outweighs, and thus justifies, the hard cap's greater restrictive effect on off-the-field competition. The EC would likely reject such a defense of the hard cap. The EC and ECJ have recognized that a *degree* of equality among clubs is a legitimate aim for sports. This does not mean that the almost perfect equality created by a hard cap is necessary or even desired. Parity must be imposed so that results are no longer predictable, and nothing more. Thus, the EC would not value the extreme balance created by a hard cap, and would likely find that it is not the least restrictive means of instilling competitive balance in European football. As such, a hard cap would not qualify for an exemption under Article 81(3) and thus would be void under Article 81(2).

In analyzing the luxury tax, the first two conditions under 81(3)—that a benefit be created and passed on to customers—represent a bigger obstacle than the third condition. The luxury tax does not eliminate the financial advantage that large-market clubs have in the upstream market, the way the hard cap does. However, it does penalize clubs for making use of that advantage and thus they may be less likely to do so. While the luxury tax will never foster equality to the extent the hard cap does, it would still likely improve competitive balance and, in turn, add to the unpredictability of results by allowing small-market clubs a better chance to contract top players. These effects amount to an improved product on

163. Improved goods and services are generally considered a legitimate form of efficiency gain under 81(3). See European Commission, Guidelines on the Application of Article 81(3) of the Treaty, *supra* note 131, at 107.

164. See *supra* note 159, ¶ 2.

165. While UEFA could alternatively argue that all policies that are less restrictive than a hard cap will fail to instill *any* competitive balance, evidence, at least in the case of MLB's luxury tax, does not entirely support such an argument. See Neil deMause, *supra* note 159.

the field. As such, the EC will recognize that the luxury tax does create a benefit, and therefore satisfies the first condition. Since this improved product is sold directly to customers in the downstream market, the luxury tax would also satisfy the second condition.

The third condition of Article 81(3) requires that the luxury tax be the least restrictive means of improving competitive balance. Though the tax might deter some large-market clubs from spending in excess of the threshold, clubs can still determine for themselves how much to spend on players. Few balancing mechanisms are as deferential to natural market forces, and as a result, the luxury tax is likely to pass a least restrictive means test. Thus the luxury tax would qualify for an exemption under Article 81(3) in the event that the EC applies Article 81(1).

C. Final Considerations

On balance, the luxury tax seems to have a better chance of surviving Article 81 scrutiny; whether it be through a determination that 81(1) does not apply, or through an 81(3) exemption. The EC's potential argument that the hard cap is not the least restrictive means of creating competitive balance and less predictable results appears to be a strong one. On the other hand, the argument that the luxury tax would not be effective at imposing competitive balance and adding to the unpredictability of results is weak in light of its effectiveness at balancing the market for players in MLB.¹⁶⁶ Furthermore, in light of the EC's distaste for restrictive practices, the broad and diverse range of markets represented by UEFA, and the powerful interests of both the players' union FIFPro and influential large-market clubs (such as the G-14¹⁶⁷) that wish to sustain their popularity, the luxury tax seems to be a more moderate policy that better accommodates the varying agendas of the loose association that is European football.

VI. CONCLUSION

In analyzing European football's problem of a lack of competitive balance, and searching for a solution, a few significant conclusions emerge. First, with few exceptions, the EC and the ECJ are going to subject European football, and all sports, to the same standards as other industries in Europe. This is evident in the *Bosman* decision and throughout the EC amendments to the transfer system. Compliance with European law can sometimes conflict with the interests of European football. In such conflicts, the law often wins out, and to some extent, this phenome-

166. See *supra* note 159.

167. See G-14, Who We Are—Basics, *supra* note 101.

non has contributed to European football's current problem of poor competitive balance.

Second, irrespective of its causes, it is clear that European football is lacking competitive balance. Over the last few seasons in national competitions across Europe, large-market clubs have dominated consistently, and by such a substantial margin, that supporters of small-market clubs have no hope that their clubs will realistically compete for their respective league championship. This problem has affected ticket sales, and has caused certain people within the sport to call for action to remedy the situation.

This Note suggests that a luxury tax is a viable solution that comports with European competition law better than a hard salary cap. That said, competition law is not the only obstacle to instituting a luxury tax in European football. Other practical considerations not explored here remain relevant. Chief among such considerations are the interests of large-market club owners, and the players themselves, who might prefer a luxury tax to a more restrictive measure such as a hard cap, but who still would likely oppose any policy that is contrary to their interests.¹⁶⁸

Finally, whether a luxury tax, a hard cap, or some other option not explored here, it is clear that European football must take steps to improve competitive balance, and increase the unpredictability of results. Arguably, professional football in Europe is played at a higher skill level than any other competition in the sport. It is unquestionable that Europe is the biggest market for the biggest game in the world. Thus, for the sake of the sport, something must be done to make European football matches matter again.

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168. It is likely that some large-market owners would see a luxury tax as inhibiting their ability to pay hefty sums for the top talent that makes their clubs successful and in turn popular. In the case of players, and the players union, FIFPro, it is easy to see how the luxury tax's restrictive effect on player salaries would be contrary to their interest.

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