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**The Striani Challenge to UEFA Financial Fair-Play.  
A New Era after Bosman or Just a Washout?***Stefano Bastianon\**

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UEFA club licensing and fair play regulations (2012) consist of two sets of rules: on the one hand, the rules concerning the club licensing system (hereinafter referred to as “CLS rules”) defining the minimum sporting, infrastructure, personnel and administrative, legal and financial criteria to be fulfilled by a club in order to be granted a licence by a UEFA member association as part of the admission procedure to enter the UEFA club competitions; on the other hand, the rules concerning the monitoring process aimed at achieving UEFA’s financial fair play objectives (hereinafter referred to as “FFP rules”). The basic rule of financial fair-play is the “break-even requirement”. According to this rule “relevant expenses” of each individual club are not allowed to exceed the club’s “relevant revenue”. This means that a club should always aim to at least break-even, that is in a reporting period a club’s relevant expenses should be no greater than the club’s relevant income. In this context, in 2013 Daniel Striani, a football players’ agent, decided to challenge the FFP rules on the field of EU law by lodging a complaint to the Commission for allegedly breach of EU competition law. According to Striani’s lawyer, the target of the complaint is Art 57 concerning the break-even requirement. Such a rule is deemed to be an agreement between undertaking pursuant to Art 101(1) TFEU which generates several anti-competitive effects: it restricts investments; it fossilizes the existing market structure, allowing current top clubs to maintain their leadership and even to increase it; it reduces the number of transfers, of the transfers amounts and of the numbers of players under contract per club; it generates a deflationary effect on the level of players’ wages; consequently, it generates a deflationary effect on the revenue of players’ agents.

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**1. INTRODUCTION**

Notwithstanding the Platini-Almunia’s joint statement on Financial Fair-Play (FFP) and EU State aid law<sup>1</sup> and UEFA’s several attempts to present FFP as the only means able

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<sup>1</sup> Joint statement on Financial Fair Play (FFP) rules and state aid control in professional football, 21 March 2012, [http://ec.europa.eu/competition/sectors/sports/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf). According to the joint statement, the objectives of financial fair play (to improve the economic and financial capability of clubs, to increase transparency and credibility, to improve governance standards in football, to encourage clubs to operate on the basis on their own revenues, to introduce more discipline and rationality in club finances, to protect the integrity and smooth running of UEFA club competitions, to encourage responsible spending for the long-term benefit of football, to protect the long-term viability and sustainability of European club football) «are also consistent with the aims and objectives of European Union policy in the field of State Aid. The main idea behind State aid control is that European undertakings should compete on a level playing field, where no operator is given special advantages by any layer of the government. In this respect, the financial regulations by UEFA and the State aid rules by the Commission pursue broadly the same objective of preserving fair competition between football clubs. There is a strong link between the FFP that introduce discipline and rationality in club football finances, and the State aid rules that prevent unauthorised public interventions, which very often concern football clubs in financial difficulties resulting from the lack of sound management of clubs’ finances. Given that the FFP rules impose stricter financial management of

to prevent European football clubs from excessive spending and indebtedness, two years ago Daniel Striani, a football players' agent, decided to challenge the UEFA Financial Fair Play regulations by lodging a complaint to the European Commission for an alleged breach of EU competition law and an application before the Brussels Court requesting it to establish that UEFA, by means of FFP, has infringed the Treaty provisions concerning competition and the internal market.<sup>2</sup> On 24 October 2014 the Commission dismissed the complaint on procedural grounds, whilst on 29 June 2015 the Brussels Court: i) declared itself incompetent for lack of international jurisdiction; ii) granted an interim measure to stop the implementation of phase II of FFP; and iii) made a reference to the ECJ for a preliminary ruling. On 16 July 2015 the ECJ declared the reference manifestly inadmissible.<sup>3</sup>

It is still too early to say if Daniel Striani is a new Jean-Marc Bosman, the football player who, in the mid-1990s, successfully challenged the UEFA rules on foreign players and transfer system on the basis of European principles of free movement of people. Apart from the same lawyer (J.L. Dupont), the two cases are totally different, in terms of legal matters at issue as well as in terms of the overall context. Bosman was a football player whilst Striani is a players' agent.<sup>4</sup> At the time of Bosman the European Union did not have a specific competence on sport whilst, after the Lisbon Treaty, sport is expressly mentioned in Art 6 and 165 TFEU. At the time of Bosman according to the Court of Justice (CJ)'s case law purely sporting rules were not subject to EU law whilst, since the *Meca-Medina* judgment,<sup>5</sup> the notion of purely sporting rules is irrelevant for the question of the applicability of EU rules to the sport sector. In 1995 the idea that UEFA's rules on transfer fee and foreign players were contrary to the EU principles of free movement of workers (and free competition) was really new and brilliant; on the contrary, in 2013 the idea that UEFA's FFP can rise anti-competitive concerns in the light of Art 101 and 102 TFEU is much less new and original. As a matter of fact, from the very beginning several scholars have underlined the potential anti-competitive character of FFP (in particular as far as the break-even rule is concerned).<sup>6</sup> Lastly, the relationship between UEFA and the EU institutions in 1995

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football clubs, they are likely in the longer run to lower or eliminate the need for State subsidies for a number of clubs. FFP and State Aid policy are also consistent insofar as each legal framework provides for specific treatment in the case of expenditure directed towards matters such as youth training and development, social and community projects and investment in infrastructure, as shown by the recent Commission's favourable decisions concerning aid to amateur sports and youth teams in France and the support of sports infrastructure in Hungary».

<sup>2</sup> Case AT.40105 UEFA Financial Fair Play rules, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40105/40105\\_220\\_6.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40105/40105_220_6.pdf)

<sup>3</sup> Case C-299/15 *Striani & Others*, ECLI:EU:C:2015:519.

<sup>4</sup> See A. DUVAL, 'UEFA may have won a battle, but it has not won the legal war over FFP', <http://www.asser.nl/SportsLaw/Blog>, according to whom "it is obvious that player agents are perceived as the dark sheep of the football family. This is not a Bosman-like situation with a player barred from exercising his job because of a European-wide boycott and rules discriminating expressly on the ground of nationality".

<sup>5</sup> Case C-519/04P, *David Meca Medina and Igor Majcen v. Commission of the European Communities*, [2006] ECR I-6991.

<sup>6</sup> D. GEEY, 'The UEFA Financial Fair Play Rules: A Difficult Balancing Act', 2011, ESLJ, p. 50; C. FLANAGAN, 'A Tricky European Fixture: an Assessment of UEFA's Financial Fair Play Regulations and

was totally different from the current one. In spite of these relevant differences, the Striani's challenge represents a very important test case for FFP.

This paper is organized as follows: § 2 describes the main features of UEFA club licensing and fair-play regulations; § 3 describes the legal arguments on which the Striani's challenge is based and the contents of the Commission's letter on May 2014 pursuant to Art 7(1) of Regulation No 773/04, the Commission's decision dismissing the complaint, the Brussels court judgment, and the ECJ order; § 4 shortly discusses the relationship between EU law and sporting regulations; § 5 is an attempt to apply the *Wouters* test to FFP; and in § 6 some concluding remarks are illustrated.

## 2. The UEFA club licensing and financial fair play regulations

The UEFA club licensing and fair play regulations (2012)<sup>7</sup> consist of two sets of rules: on the one hand, the rules concerning the club licensing system; on the other hand, the rules concerning the monitoring process and, consequently, FFP.

As far as the scope of application is concerned, Part II of these regulations govern the rights, duties and responsibilities of all parties involved in the UEFA club licensing system and define in particular:<sup>8</sup>

- a) the minimum requirements to be fulfilled by a UEFA member association in order to act as a licensor for its clubs, as well as the minimum procedures to be followed by the licensor in the assessment of the licensing criteria;

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Their Compatibility with EU Law', 2013, ISLJ, p. 148; J. LINDHOLM, 'The Problem With salary Caps Under European Union Law: The Case Against Financial Fair Play', 2010, Tex. Rev. Ent. & Sports L., p. 189; C. LONG, 'Promoting Competition or Preventing It? A competition Analysis of UEFA's Financial Fair Play Rules', 2012, 23 Marq. Sports L. Rev., p. 75; J.C. MÜLLER, J. LAMMERT, G. HOVEMANN, 'The Financial fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability at European Club Football?', 2012, IJSF, p. 117; P. MADDEN, 'Welfare Economics of Financial Fair Play in a sports League with Benefactors Owners', 2012, JSE, p. 117; T. PEETERS, S. SZYMANSKI, 'Vertical Restraints in Soccer: Financial fair Play and the English Premier League', Research Paper 2012-028, Department of Economics, University of Antwerp, 2012; M. SAAS, 'Long-Term Competitive Balance under UEFA Financial Fair Play Regulations', Working Paper 5/2012, Faculty of Economics and Management, University of Magdeburg, March 2012; T.J. JEMSON, 'For the Love of Money, Football and Competition Law: An Analysis of Whether UEFA's Financial Fair Play Regulations breach European Competition Law', A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago – Te Whare Wananga o Otago, October 2013; P.V. RODRIGO ZAMORA, 'Fair Play Financiero y caso Striani', www.iusport.com; H. VOPEL, 'Is Financial Fair Play Really Justified? An Economic and Legal Assessment of UEFA's Financial fair Play Rules', HWWI Policy, Paper 79, 2013; N. PETTIT, 'Financial Fair Play or Rent-Seeking Oligopoleague? A Preliminary analysis of the UEFA's Break Even Requirement Under the EU Competition Rules', <http://ssrn.com/abstract=2438399>; O. BUDZINSKI, 'The competition economics of financial fair play', Ilmenau University of Technology, Institute of Economics, 2014, Discussion Paper 85; H. PREUSS, K. K. HAUGEN, M. SCHUBERT, 'UEFA financial fair play: the curse of regulation', <http://www.ejss-journal.com/index.php/uefa-financial-fair-play-the-curse-of-regulation>; S. BASTIANON, 'Dal Trattato di Lisbona al nuovo regolamento UEFA sulle licenze e sul fair-play finanziario', Riv. Dir. Sport., 2013, p. 7 ss.

<sup>7</sup> UEFA Club Licensing and Financial Fair Play Regulations, 2012, [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/01/80/54/10/1805410_DOWNLOAD.pdf). On 29 June 2015 the UEFA Executive Committee approved the 2015-2018 UEFA Club Licensing and Financial Fair Play Regulations which represents an update of the previous version. The paper refers to the 2012 version only.

<sup>8</sup> UEFA Club Licensing and Financial Fair Play Regulations, Art. 1(2).

- b) the licence applicant and the licence required to enter the UEFA club competitions;
- c) the minimum sporting, infrastructure, personnel and administrative, legal and financial criteria to be fulfilled by a club in order to be granted a licence by a UEFA member association as part of the admission procedure to enter the UEFA club competitions.

Part III of these regulations further govern the rights, duties and responsibilities of all parties involved in the UEFA club monitoring process to achieve UEFA's financial fair play objectives, and define in particular<sup>9</sup>:

- a) the role and tasks of the UEFA Club Financial Control Body, the minimum procedures to be followed by the licensors in their assessments of the club monitoring requirements, and the responsibilities of the licensees during the UEFA club competitions;
- b) the monitoring requirements to be fulfilled by licensees that qualify for the UEFA club competitions.

### **2.1. The UEFA club licensing mechanism in a nutshell**

The UEFA club licensing discipline goes back to 2003 and the provisions laid down in the last version of the UEFA club licensing (and financial fair play) regulations (2012) represent a sort of enhancement of the previous rules.

The aims of club licensing discipline are listed in Art 2(1) and can be summarized as follows:

- a) to further promote and continuously improve the standard of all aspects of football in Europe and to give continued priority to the training and care of young players in every club;
- b) to ensure that clubs have an adequate level of management and organisation;
- c) to adapt clubs' sporting infrastructure to provide players, spectators and media representatives with suitable, well-equipped and safe facilities;
- d) to protect the integrity and smooth running of the UEFA club competitions;
- e) to allow the development of benchmarking for clubs in financial, sporting, legal, personnel, administrative and infrastructure-related criteria throughout Europe.

From a general point of view it is worthy to underline the following points.

Firstly, the UEFA club licensing system is very decentralized: UEFA licences are not granted directly by UEFA, but by UEFA member associations or by their affiliated leagues (so-called licensors). In such a decentralized system UEFA requires that the licensor must ensure that all applicable provisions concerning the UEFA club licensing mechanism are integrated into national club licensing regulations.

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<sup>9</sup> UEFA Club Licensing and Financial Fair Play Regulations, Art 1(3).

Secondly, the UEFA member association is free to increase or introduce additional minimum criteria in its national club licensing regulations for the purpose of entering the UEFA club competitions.

Thirdly, the UEFA member association is encouraged to apply a licensing system and monitoring requirements to govern participation in its domestic competitions. For this purpose the UEFA member association is free to increase, decrease, or introduce additional minimum criteria in its national club licensing regulations for the purpose of entering the domestic competitions.

More specifically, the financial criteria to be met by a licence applicant are listed in Articles 46 to 52 as follows:

- a) the licence applicant must provide the licensor with the overall legal group structure, duly approved by management. This document must include information on any subsidiary, any associated entity and any controlling entity up to the ultimate parent company and ultimate controlling party;
- b) the licence applicant must submit audited annual financial statements in respect of the statutory closing date prior to the deadline for submission of the application to the licensor and prior to the deadline for submission of the list of licensing decisions to UEFA. The financial information to be disclosed to the licensor are specifically indicated in Annex VI, notwithstanding the requirements of national accounting practice, the International Financial Reporting Standards (IFRS) or the International Financial Reporting Standard for Small and Medium-sized Entities (IFRS for SMEs);
- c) in case the statutory closing date of the licence applicant is more than six months before the deadline for submission of the list of licensing decisions to UEFA, the licence applicant must prepare and submit additional audited financial statements covering the interim period. In particular, the interim financial statements must consist of: i) a balance sheet as of the end of the interim period and a comparative balance sheet as of the end of the immediately preceding full financial year; ii) a profit and loss account for the interim period, with comparative profit and loss accounts for the comparable interim period of the immediately preceding financial year; iii) a cash flow statement for the interim period, with a comparative statement for the comparable interim period of the immediately preceding financial year; iv) specific explanatory notes;
- d) the licence applicant must prove that as of 31 March preceding the licence season it has no overdue payables (as defined in Annex VIII<sup>10</sup>) that refer to transfer activities that occurred prior to the previous 31 December;

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<sup>10</sup> Annex VIII reads as follows: «1. Payables are considered as overdue if they are not paid according to the agreed terms. 2. Payables are not considered as overdue, within the meaning of these regulations, if the licence applicant/licensee (i.e. debtor club) is able to prove by 31 March (in respect of Articles 49 and 50) and by 30 June and 30 September (in respect of Articles 65 and 66) respectively that: a) it has paid the relevant amount in full; or b) it has concluded an agreement which has been accepted in writing by the creditor to extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline); or c) it has brought a legal claim which has been deemed admissible by the competent authority under national law or

- e) the licence applicant must prove that as of 31 March preceding the licence season it has no overdue payables (as defined in Annex VIII) towards its employees or social and tax authorities as a result of contractual and legal obligations towards its employees that arose prior to the previous 31 December;
- f) the licence applicant must prepare and submit future financial information in order to demonstrate to the licensor its ability to continue as a going concern until the end of the licence season if it has breached any of the following two indicators: going concern and negative equity. Future financial information consists of:
  - i) a budgeted profit and loss account, with comparative figures for the immediately preceding financial year and interim period (if applicable);
  - ii) a budgeted cash flow, with comparative figures for the immediately preceding financial year and interim period (if applicable);
  - iii) explanatory notes, including a brief description of each of the significant assumptions (with reference to the relevant aspects of historic financial and other information) that have been used to prepare the budgeted profit and loss account and cash flow statement, as well as of the key risks that may affect the future financial results.

## **2.2. The UEFA club monitoring process in a nutshell**

Contrary to the UEFA club licensing mechanism, the UEFA provisions concerning the monitoring process and FFP represent a completely new discipline.

The specific objectives of FFP listed in Art. 2(2) are very ambitious and relate to:

- a) improving the economic and financial capability of the clubs, increasing their transparency and credibility;
- b) placing the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually;
- c) introducing more discipline and rationality in club football finances;
- d) encouraging clubs to operate on the basis of their own revenues;

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has opened proceedings with the national or international football authorities or relevant arbitration tribunal contesting liability in relation to the overdue payables; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider that such claim has been brought or such proceedings have been opened for the sole purpose of avoiding the applicable deadlines set out in these regulations (i.e. in order to buy time), the relevant amount will still be considered as an overdue payable; or d) it has contested to the competent authority under national law, the national or international football authorities or the relevant arbitration tribunal, a claim which has been brought or proceedings which have been opened against it by a creditor in respect of overdue payables and is able to demonstrate to the reasonable satisfaction of the relevant decision-making bodies (licensor and/or UEFA Club Financial Control Body) that it has established reasons for contesting the claim or proceedings which have been opened; however, if the decision-making bodies (licensor and/or UEFA Club Financial Control Body) consider the reasons for contesting the claim or proceedings which have been opened as manifestly unfounded the amount will still be considered as an overdue payable».

- e) encouraging responsible spending for the long-term benefit of football;
- f) protecting the long-term viability and sustainability of European club football.

It follows from the foregoing that if we compare Art 1(3) with Art 2(2) we can say that the monitoring process is the instrument to achieve the abovementioned FFP objectives.

Contrary to the UEFA club licensing system, the new monitoring process relates only to licensees that have qualified for a UEFA club competition and it is governed directly by UEFA through the Club Financial Control Body (CFCB). Through the monitoring process UEFA aims at verifying that all licensees that have qualified for a UEFA club competition fulfil the so-called monitoring requirement: that is, i) the break-even requirement and ii) the other monitoring requirements.

### 2.2.1. The break-even requirement.

The break-even requirement is laid down in Art 58 to 63 and is strictly linked to the following four key notions:

- a) the notion of relevant income and expenses;
- b) the notion of monitoring period;
- c) the notion of break-even result; and
- d) the notion of acceptable deviation.

Generally speaking, in economics the break-even point is the point at which costs or expenses and revenue are equal. However, as regards FFP the break-even requirement is slightly different.

Firstly, the break-even rule does not refer to expenses and revenue generically, but only to “relevant” expenses and income as defined in Art 58 (and Annex X) and summarized as follows:

<b>RELEVANT INCOME</b>	<b>RELEVANT EXPENSES</b>
Gate receipts	Cost of sales
Broadcasting rights	Employee benefits expenses
Sponsorship and advertising	Other operating expenses
Commercial activities	Amortisation or costs of acquiring player registrations
Other operating income	Finance costs
Profit on disposal of player registrations	Dividends
Income from disposal of player registrations	
Excess proceeds on disposal of tangible Fixed assets	

Finance income	
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It is worthy to note that relevant income does not include any non-monetary items or certain income from non-football operations whereas relevant expenses do not include depreciation/impairment of tangible fixed assets, amortisation/impairment of intangible fixed assets (other than player registrations), expenditure on youth development activities, expenditure on community development activities, any other non-monetary items, finance costs directly attributable to the construction of tangible fixed assets, tax expenses or certain expenses from non-football operations.

In this context, Art 60 defines the break-even result as the difference between relevant income and relevant expenses.

Secondly, the simple fact that expenses are equal to income is neither sufficient nor necessary for the break-even requirement to be fulfilled. Pursuant to Art 63(1) to fulfil the break-even requirement a club must show:

- a) a break-even surplus for two reporting periods (T-2 and T-1);<sup>11</sup> and
- b) no breach of indicators listed in Art 62(3) (going concern, negative equity, break-even result and overdue payables).

However, the break-even requirement is fulfilled, even if one of these indicators is breached, if:

- a) the licensee has an aggregate break-even surplus for reporting periods T-2, T-1 and T; or
- b) the licensee has an aggregate break-even deficit for reporting periods T-2, T-1 and T which is within the acceptable deviation having also taken into account the surplus (if any) in the reporting periods T-3 and T-4.

Moreover, by virtue of the abovementioned notion of acceptable deviation, a club can fulfill the break-even requirement even if it shows a break-even deficit. As a matter of fact, the acceptable deviation is defined as the maximum aggregate break-even deficit possible for a club to be deemed in compliance with the break-even requirement as defined in Article 63. Pursuant to Art. 61(2) the acceptable deviation is €5 million. However, it can exceed this level up to the following amounts if such excess is entirely covered by contributions from equity participants and/or related parties:

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<sup>11</sup> Art 59 reads as follows: “1. A monitoring period is the period over which a licensee is assessed for the purpose of the break-even requirement. As a rule it covers three reporting periods: a) the reporting period ending in the calendar year that the UEFA club competitions commence (hereinafter: reporting period T), and b) the reporting period ending in the calendar year before commencement of the UEFA club competitions (hereinafter: reporting period T-1), and c) the preceding reporting period (hereinafter: reporting period T-2). As an example, the monitoring period assessed in the licence season 2015/16 covers the reporting periods ending in 2015 (reporting period T), 2014 (reporting period T-1) and 2013 (reporting period T-2). 2. By exception to this rule, the first monitoring period assessed in the licence season 2013/14 covers only two reporting periods, i.e. reporting periods ending in 2013 (reporting period T) and 2012 (reporting period T-1)”.



- a) €45 million for the monitoring period assessed in the licence seasons 2013/14 and 2014/15;
- b) €30 million for the monitoring period assessed in the licence seasons 2015/16, 2016/17 and 2017/18;
- c) a lower amount as decided in due course by the UEFA Executive Committee for the monitoring periods assessed in the following years.

A further exception to the break-even requirement is laid down in Art 63(2) according to which the break-even requirement is fulfilled, even if an indicator (as defined in Article 62(3)) is breached, if:

- i) the licensee has an aggregate break-even surplus for reporting periods T-2, T-1 and T;  
or
- ii) the licensee has an aggregate break-even deficit for reporting periods T-2, T-1 and T which is within the acceptable deviation (as defined in Article 61) having also taken into account the surplus (if any) in the reporting periods T-3 and T-4 (as defined in Article 60(6)).

The Art 63 provisions are summarized in the following schedule:

Going concern	Negative equity	Break-even result	Overdue payables	T-2	T-1	T	Acceptable deviation	Break-even requirement
✓	✓	✓	✓	Surplus	Surplus			OK
✗	✓	✓	✓	Aggregate Break-even Surplus				OK
✓	✗	✓	✓	Aggregate Break-even Surplus				OK
✓	✓	✗	✓	Aggregate Break-even Surplus				OK
✓	✓	✓	✗	Aggregate Break-even Surplus				OK
✗	✓	✓	✓	Aggregate Break-even Deficit			✓*	OK
✓	✗	✓	✓	Aggregate Break-even Deficit			✓*	OK
✓	✓	✗	✓	Aggregate Break-even Deficit			✓*	OK
✓	✓	✓	✗	Aggregate Break-even Deficit			✓*	OK
✓	✓	✓	✓	Aggregate Break-even Deficit			✗*	NO

\* having also taken into account the surplus (if any) in the reporting periods T-3 and T-4

The discipline of the break-even requirement is completed by Annex XI, point 2, according to which for the purpose of the first two monitoring periods (monitoring periods assessed in the seasons 2013/14 and 2014/15) and as regards players under contract before 1 June 2010, the CFCB is allowed to take into account in a favourably way the following additional transitional factors:

- i) a licensee reports an aggregate break-even deficit that exceeds the acceptable deviation:
- ii) it reports a positive trend in the annual break-even results (proving it has implemented a concrete strategy for future compliance);
- iii) it proves that the aggregate break-even deficit is only due to the annual break-even deficit of the reporting period ending in 2012 which in turn is due to contracts with players undertaken prior to 1 June 2010.

This means that a licensee that reports an aggregate break-even deficit that exceeds the acceptable deviation but satisfies both conditions described above should in principle not be sanctioned.

### 2.2.2. The other monitoring requirements.

The other monitoring requirements represent an enhancement of certain financial criteria already discussed for the purposes of UEFA club licensing. Very briefly, Art 64 requires the licensee, by the deadline and in the form communicated by the UEFA administration, to prepare and submit enhanced future financial information that consists of:

- i) an update of the future financial information already submitted to the licensor according to Article 52, if it has breached indicator 1 and/or 2 as defined in Articles 52(2) and 62(3);
- ii) new future financial information, if it has breached indicator 3 and/or 4 as defined in Article 62(3).

Such enhanced future financial information must cover the 12-month period commencing immediately after the statutory closing date of the reporting period T (hereinafter: reporting period T+1). Art 65 requires the licensee to prove that as of 30 June of the year in which the UEFA club competitions commence it has no overdue payables (as specified in Annex VIII) towards other football clubs as a result of transfer activities undertaken up to 30 June. Analogously, Art 66 requires the licensee to prove that as of 30 June of the year in which the UEFA club competitions commence it has no overdue payables (as specified in Annex VIII) towards its employees and/or social/tax authorities (as defined in paragraphs 2 and 3 of Article 50) that arose prior to 30 June. Lastly, Art 67 requires the licensee to promptly notify the licensor in writing about any significant changes including, but not limited to, subsequent events of major economic importance until at least the end of the licence season.

To sum up, we can say that FFP consists of two main rules, namely the break-even rule and the no overdue payables rule. However, as far as competition law is concerned, these two rules play a different role. The no overdue payables rule is consistent with the basic principle according to which one must pay its debts and it is clearly related to the problem of financial doping. On the contrary, the break-even rule directly affects the investment behaviour of the clubs. Why? The answer is quite simple:

- a) relevant income is defined narrowly due to the fact that external funding is excluded from the notion of relevant income;

- b) the maximum expenses for a club is restricted to the volume of relevant income;
- c) in the football sector the dominant part of relevant expenses is represented by player salaries and transfer fees;
- d) consequently, the break-even rule amounts to an (indirect and relative) salary cap.

To put it another way: the break-even rule aims at limiting investments in football players and reducing the amount of money football clubs can spend on player salaries. From this point of view, concerns about competition law are not groundless since Art 101(1)(a) and (b) TFEU prohibits as incompatible with the internal market all agreements between undertakings that fix prices and limit investments.

### 3. THE STRIANI COMPLAINT

The only thing we know about Striani's complaint comes from JL Dupont's article published on *The Wall Street Journal* on 25 March 2013<sup>12</sup> and his press releases dated 6 May 2013<sup>13</sup> and 21 May 2014.<sup>14</sup>

According to Striani's lawyer, the target of the complaint is Art 57 concerning the break-even requirement. Such a rule is deemed to be an agreement between undertakings pursuant to Art 101(1) TFEU which generates several anti-competitive effects:

- a) it restricts investments;
- b) it fossilizes the existing market structure, allowing current top clubs to maintain their leadership and even to increase it;
- c) it reduces the number of transfers, of the transfers amounts and of the numbers of players under contract per club;
- d) it generates a deflationary effect on the level of players' wages;
- e) consequently, it generates a deflationary effect on the revenue of players' agents.<sup>15</sup>

In his article published in the *Wall Street Journal* Mr Dupont alleges that the break-even requirement does not address the problem of the numerous competitive imbalances that characterize European football clubs; on the contrary, by preventing smaller clubs

<sup>12</sup> J.L. DUPONT, *Football's Anticompetitive Steak*, <http://online.wsj.com/news/articles/SB10001424127887324077704578357992271428024>

<sup>13</sup> J.L. DUPONT Press Release, 6 May 2013, <http://www.soccernomics-agency.com/?p=454>

<sup>14</sup> J.L. DUPONT Press Release 21 May 2014, <http://www.as.com/misc/pdf/nota-prensa-ingles.pdf>

<sup>15</sup> Likewise, according to J.G. MAXCY, *The American View on Financial Fair Play* (January 20, 2014). ESEA Conference Volume. O. BUDZINSKI, A. FEDDERSEN, (Eds.) Oxford, UK: Peter Lang International Academic Publishers, 2014. Available at SSRN: <http://ssrn.com/abstract=2405241>, p. 2 «certainly FFP will reduce the number of player transfers, the bidding for services, lower the players' share of the spoils and increase profits. Additionally, as others have indicated, the balance of power will more acutely center on the traditionally wealthy clubs as capital injections to upstart clubs from outside benefactors will become more difficult. It is also likely, based on the American college sports experience, that effective policing and enforcement of FFP regulations will be more costly than desired. Therefore FFP compliance will be investigated and enforced neither equitably or efficiently».

from investing in their longer-term success by means of external funding, such clubs will have no possibility to compete with bigger clubs.

In any case, according to Mr Dupont the break-even rule does not fulfil the proportionality test required by EU law. If the problem is represented by the competitive imbalance among European teams, Mr Dupont argues that the right (*i.e.*, proportionate) answer could be a more ambitious system of revenue-sharing coupled with a luxury tax on high spending clubs; on the contrary, if the problem is the integrity of UEFA competitions, the so-called financial doping can be neutralized by requiring that the overspending is fully guaranteed before the start of the competition and for its duration.

### **3.1. The Commission's letter on May 2014 pursuant to Art 7(1) of Regulation 773/2004**

On 21 May 2014 Mr Dupont confirmed that the Commission's DG Competition wrote a letter where it affirms that, on the basis of the information in its possession, there are insufficient grounds for acting on the complaint. For this reason, pursuant to Art 7(1) of Regulation No 773/2004 the Commission informed Mr Striani (and UEFA) of its reasons and set a time-limit within which Mr Striani may make known its views in writing.

According to the excerpt of the Commission's letter reported by Mr Dupont in his press release, in the Commission's view there are two main reasons that can lead to a rejection of the complaint:

- a) Mr Striani lacks legitimate interest;
- b) the national judge (Brussels Court) appears to be well-placed to handle the matter.

As regards Mr Striani's legitimate interest, Art 5(1) of Regulation No 773/2004 states that natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation No 1/2003. According to CJ settled case-law complainants have to demonstrate their legitimate interest and in case the complainant is unable to demonstrate a legitimate interest, the Commission is entitled, without prejudice to its right to initiate proceedings of its own initiative, not to pursue the complaint. Basically speaking, both the Commission and the Court tend to interpret broadly the notion of legitimate interest, emphasizing the fact that the person can plausibly show to have suffered damage as a result of the infringement.<sup>16</sup> In its Notice on the handling of complaints under Art 101 and 102 TFEU the Commission, on the one hand, affirms that complainants must be in a position of being directly and adversely affected by the alleged infringement and, on the other hand, that the Commission does not consider as a legitimate interest within the meaning of Article 7(2) the interest of persons or organisations that wish to come forward on general interest considerations without showing that they or their members are liable to be

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<sup>16</sup> M. STRAGUSA, C. RIZZA (Eds), *EU competition law, Vol. III, Cartels and horizontal agreements*, Claeys & Casteels, 2007, p. 118.

directly and adversely affected by the infringement (*pro bono publico*).<sup>17</sup> In this regard it is worthy to note that:

- i) in so far as the claim refers to the fact that the break-even rule restricts investments, fossilizes the existing market structure, allows current top clubs to maintain their leadership and even to increase it, reduces the number of transfers, of the transfers amounts and of the numbers of players under contract per club and generates a deflationary effect on the level of players' wages, Mr Striani looks like he is acting *pro bono publico*;
- ii) in so far as the claim refers to the so-called deflationary effect on the revenue of players' agents, it is evident that the potential damage is clearly indirect.<sup>18</sup>

As a consequence, it is not surprising that in the letter sent to Mr Striani (and UEFA) the Commission has expressed doubts as regards the legitimate interest of the complainant since UEFA's regulations refers primarily to football clubs and agents are affected only indirectly. However, it is worthy to note that Mr Striani's lack of legitimate interest does not represent an insurmountable obstacle as the Commission has the power to take up the case *ex officio*. Assuming that Mr Striani lacks legitimate interest, we should ask ourselves why the Commission has decided not to handle the case *ex officio*.

However, it is important to underline that according to the press release published on 25 July 2014 Mr Striani's lawyer affirmed that, "football fans – from France, Belgium and England – have filed a complaint with the European Commission arguing that the "requirement for break-even" imposed by UEFA in its Financial Fair Play regulations contravenes European Union fundamental freedoms, including the right to free competition".<sup>19</sup> Later on, during an interview on 9 August 2014 Mr Striani's lawyer confirmed that, probably as a reaction to sanctions taken by UEFA against certain clubs for breach of FFP, "supporters joined the existing actions initiated a year ago by Mr Striani".<sup>20</sup> It follows from the foregoing that whether fans have filed a different complaint or have joined the actions launched by Mr Striani, any argument concerning the legitimate interest of the complainant(s) becomes more important. If one considers

<sup>17</sup> See Commission notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05), *OJ*, 27 April 2004, C 101, p. 65, para 38.

<sup>18</sup> In its notice on the handling of complaints, the Commission expresses the view that «individual consumers whose economic interests are directly and adversely affected insofar as they are the buyers of goods or services that are the object of an infringement can be in a position to show a legitimate interest» (para 37). This means that so-called indirect buyers are generally not considered to be directly and adversely affected. *Mutatis mutandis*, the same seems to be true for Mr. Striani.

<sup>19</sup> Press Release 25 July 2014, <http://fairplayfc.org>

<sup>20</sup> Exclusive interview from our lawyer, Jean-Louis Dupont, 9 August 2014, <http://fairplayfc.org/exclusive-interview-from-our-lawyer-jean-louis-dupont>. According to the Commission's final decision in the Striani case, there are two other complaints pending before the Commission against FFP: two complaints submitted on behalf of football fans (including Manchester City FC Supporters Club) and players' agents (AT. 40217 and AT. 40222). Lastly, according to J.L. Dupont's press release on 13 November 2014, there is another complaint submitted on behalf of 35 PSG fans. See <http://www.lawinsport.com/sports-law-news/item/press-release-new-action-taken-by-psg-fans-against-uefa-s-financial-fair-play>.

that the break-even rule tends to restrict contributions from the owners, the idea that such a restriction is likely to result in an increase of the economic pressure on supporters is not groundless.

As regards the fact that the national (Belgian) judge is well placed to handle the complaint, the Commission's letter highlights the following points:

“first, (...) the Brussels Court is in a position to gather the factual information necessary to determine whether the FFP, and in particular the break-even requirement, constitutes an infringement of Article 101 and 102 TFEU.

Second, the Brussels Court is able to examine whether the FFP, and in particular the break-even requirement: (i) restricts competition within the meaning of Article 101(1) TFEU; (ii) benefits from an exemption under Article 101(3) TFEU; and (iii) infringes Article 102 TFEU. The Brussels Court can also apply the nullity sanction provided for in Article 101(2) TFEU and award damages for breach of Articles 101 and 102 TFEU.

Third, the Brussels Court can make a reference for a preliminary ruling to the Court of Justice of European Union pursuant to Article 267 TFEU concerning the compatibility of the FFP, and in particular the break-even requirement, with Articles 101 and 102 TFEU (...).

Fourth, the Brussels Court can take effective action because of the *sui generis* system established by UEFA for the purpose of participation in pan-European club competitions. The FFP uniformly applies across the EU to all clubs that participate, or want to participate, in UEFA club competitions. If the Brussels Court were to consider the break-even requirement to be contrary to Articles 101 and/or 102 TFEU, such a ruling – even if limited to the facts of the case before the Brussels Court – is likely to have an impact on the operation of that requirement across the EU.

Fifth, if the Brussels Court were to consider the break-even requirement to be contrary to Articles 101 and/or 102 TFEU, you [Mr Striani] would not need to bring further actions before national courts in other Member States. This is because if the Brussels Court applied the nullity sanction provided for Article 101(2) TFEU, the break-even requirement would also cease to produce effects in other Member States”.<sup>21</sup>

### **3.2. Some remarks on the Commission's letter.**

To fully understand the relevance of the Commission's letter it is of paramount importance to know what it represents within the context of Mr Striani's complaint.

Art 7 of Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU reads as follows:

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<sup>21</sup> See J.L. DUPONT Press Release 21 May 2014.

“1. where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.”

It follows from the foregoing that the Commission’s letter does not amount to a formal rejection of the complaint (Art 7(2) Reg No 773/220); quite simply the Commission has informed the complainant that it considers that there are insufficient grounds to take further action and has set a time-limit within which the complainant may make known its views in writing.

That said, no doubts that the abovementioned reasons look consistent with points 17 and 44 of the Commission’s notice on the handling of complaints under Art 101 and 102 TFEU. According to the first provision, “the fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint”; according to the latter provision, it is affirmed that, among the criteria which have been held relevant in the case law for the assessment of the Community interest in the further investigation of a case, “the Commission can reject a complaint on the ground that the complainant can bring an action to assert its rights before national courts”.<sup>22</sup> The same is true as regards the abovementioned advantages related to civil actions before national courts as illustrated at point 16 of the Commission’s notice.<sup>23</sup>

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<sup>22</sup> Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, paras 88 ss.; Case T-5/93, *Roger Tremblay and Others v Commission of the European Communities*, [1995] ECR II-185, paras 65 ss.; Case T-575/93, *Casper Koelman v Commission of the European Communities*, [1996] ECR II-1, paras 75-80.

<sup>23</sup> Para 16 reads as follows: “Action before national courts has the following advantages for complainants: National courts may award damages for loss suffered as a result of an infringement of Article 81 or 82. National courts may rule on claims for payment or contractual obligations based on an agreement that they examine under Article 81. It is for the national courts to apply the civil sanction of nullity of Article 81(2) in contractual relationships between individuals. They can in particular assess, in the light of the applicable national law, the scope and consequences of the nullity of certain contractual provisions under Article 81(2), with particular regard to all the other matters covered by the agreement. National courts are usually better placed than the Commission to adopt interim measures. Before national courts, it is possible to combine a claim under Community competition law with other claims under national law. Courts normally have the power to award legal costs to the successful applicant. This is never possible in an administrative procedure before the Commission”.

Despite those provisions, some critical remarks are still possible. First of all, but for point 2 relating to the award of damages<sup>24</sup> and point 3 relating to a reference for preliminary ruling, all the other points mentioned in the Commission's letter are true for the Commission too; therefore, both the Brussels Court and the Commission are well placed to handle the complaint. Moreover, the Commission's arguments put forward in its letter represent just an exercise of "cut and paste" of the arguments illustrated in the Notice on the handling of complaint, without any specific reference to the *Striani* case. In other words, the idea that the discretionary power of the Commission in giving different degrees of priority to complaints can be extended as far as the Commission can dismiss a complaint by simply alleging that the complainant can assert its rights before the national courts is rather questionable. If one considers that in the *Courage v Crehan*<sup>25</sup> and *Manfredi*<sup>26</sup> judgments the CJ has ruled that any individual can rely on a breach of Article [101](1) of the Treaty before a national court, in my opinion this means that the Commission is automatically entitled to dismiss any complaint just because any individual can secure its rights before a national court. However, at least two arguments support the theory that this is not the right way to interpret the Commission's power to give differing degrees of priorities to complaints: on the one hand, point 17 of the Notice on the handling of complaints states that the fact that a complainant can secure the protection of his rights by an action before a national court is *an important element* that the Commission *may* take into account in its examination of the Community interest for investigating a complaint. This implies that the availability of a private remedy before a national court is neither a *decisive* element to dismiss the complaint, nor an element the Commission *is obliged* to take into account. In this regard, it is worthy to underline that the parallel application of EU competition rules by the Commission and by national courts represents a fundamental element of EU competition law enforcement. Pursuant to point 11 of the Notice on the co-operation between the Commission and the national courts of the Member States "a national court may be applying [EU] competition law to an agreement ... affecting trade between Member States at the same time as the Commission".<sup>27</sup> On the other hand, pursuant to point 43 of the Notice "the assessment of the Community interest raised by a complaint depends on the circumstances of each individual case". From the excerpt of the Commission's letter reported in Mr Dupont's press release it is difficult to understand which specific circumstances of the case at issue the Commission has taken into account other than the civil action pending before the Brussels court.

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<sup>24</sup> However, in the context of the legal action pending before the Brussels court the relevance of private damages is minimal considering that Mr. Striani has claimed damages for the symbolic amount of 1 Euro. See A. DUVAL, *UEFA may have won a battle, but it has not won the legal war over FFP*.

<sup>25</sup> Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, 2001 [ECR] II-6297, para 24.

<sup>26</sup> Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) *v Assitalia SpA*, 2006 [ECR] I-6619.

<sup>27</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC, *OJ*, 27 April 2004, C 101, p. 54 ss.



Secondly, it should be borne in mind that the Commission is not obliged to set aside a case for lack of Community interest and therefore it could have decided to take it up *ex officio*.

Thirdly, we cannot forget that the break-even rule can be described as a horizontal agreement between competitors and many scholars have labelled it as a *sui generis* price-fixing in the form of an indirect<sup>28</sup> and relative<sup>29</sup> salary cap at least as far as its effects on competition are concerned.<sup>30</sup> In such a situation the dismissal of the complaint on the basis of the lack of Community interest is difficult to reconcile with the Commission's policy to consider the fight against horizontal agreements (in particular those related to hard core restrictions such as price-fixing agreements) to be one of its main priorities.

Fourthly, point 14 of the Commission's notice on co-operation within the Network of Competition Authorities (NCAs)<sup>31</sup> states clearly that, "the Commission is particularly well placed if one or several agreement(s) (...) have effects on competition in more than three Member States". Moreover, according to point 15, "the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement".

No further discussion is required to realize that FFP regulations and, in particular, the break-even rule are likely to affect competition in more than three Member States and that the compatibility of FFP with EU competition law represents a very important,

<sup>28</sup> The break-even rule represents an indirect salary cap in so far as it does not, "stipulate a fixed amount that clubs may spend on salaries and that is the same for all clubs. The rules, however, have the same effect and purpose as salary caps in other leagues: to limit how much money clubs can spend on player salaries" (J. LINDHOLM, *The problem with salary caps under European Union law: the case against financial fair play*, at p. 191).

<sup>29</sup> The break-even rule represents a relative salary cap in so far as the amount that can be spent on player salaries is different for each club. Indeed, UEFA FFP stipulates that each club can spend only what it earns; as a consequence, the more a club earns, the more it can spend.

<sup>30</sup> SEE J. LINDHOLM, *The problem with salary caps under European Union law: the case against financial fair play*, at p. 200: "in this regard the Financial Fair Play rules function like other salary caps. Professional football clubs compete in selling their product – football matches – and therefore also compete when it comes to buying the raw material – players. The Financial Fair Play rules have as their main and explicit aim reducing the amount of money clubs spend on wages. In this regard, the rules function like price fixing agreements among competing buyers in other sectors". Similarly, T. J. JEMSON, *For the love of money, football and competition law*, at p. 19: "One of the primary objectives of FFP regulations is to decrease pressure on salaries and transfer fees and limit inflationary effect. To achieve this objective, UEFA created the "break-even" rule to place a limit on how much each club is able to spend on player salaries. This objective, combined with the use of the "break-even" rule gives the FFP regulations the appearance of a price fixing arrangement. Price fixing is one of the examples of an anticompetitive agreement in Article 101(1)(a) of the Treaty, and it is often characterized as having the object of restricting competition. European courts have indicated price fixing includes any agreement that directly or indirectly restricts price competition, with one example being setting maximum prices. The FFP regulations appear to fall within this definition. The limit on spending in the "break-even" rule can be interpreted as a maximum price mechanism that limits the ability of clubs to compete for players based on price".

<sup>31</sup> Commission Notice on cooperation within the Network of Competition Authorities, *OJ C 101*, 27 April 2004, p. 43 ss.

complex and new issue. As a matter of fact, notwithstanding the *Meca Medina* judgment and following statements in the 2007 White Paper on sport and in the 2011 Commission's Notice Developing the European dimension in sport, the topic of application of EU competition law to sporting regulations and which objectives pursued by sporting organizations can be considered legitimate is still problematic.

I admit that one could argue that those provisions relate only to the division of work within the NCAs without prejudice to the relationship between public enforcement and private enforcement of EU competition law. However, if one considers the potential pan-European anti-competitive effects of FFP and the relevance of the matters raised in Mr Striani's complaint in terms of law, policy and economics, the simple idea that a national court is better placed than the Commission to handle the complaint seems rather questionable.

Moreover, Art 10 of Regulation No 1/2003 states that, "where the Community public interest relating to the application of Articles [101] and [102] of the Treaty so requires, the Commission, acting on its own initiative, may by decision find that Article [101] of the Treaty is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article [101](1) of the Treaty are not fulfilled, or because the conditions of Article [101](3) of the Treaty are satisfied".

Put it in simple terms: on the one hand, the Commission has put a lot of emphasis on the UEFA's new licensing and fair-play regulations and has gone as far as organizing in 2009 in Brussels a conference on this subject-matter;<sup>32</sup> issuing in 2012 a joint statement (EU-UEFA) where it is expressly affirmed that objectives of FFP are consistent with the aims and objectives of European Union policy in the field of State Aid;<sup>33</sup> and re-affirming in 2014 its political support to FFP.<sup>34</sup> In particular, to fully understand the Commission's deep involvement in UEFA club licensing system (a part of which is represented by FFP) it is interesting to read the background paper of the 2009 conference where it is affirmed that:

- a) the conference is part of the implementation of Action 47 of the "Pierre de Coubertin" action plan which accompanies the White paper on sport;

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<sup>32</sup> See Press Release IP709/1330, 17 September 2009, [http://europa.eu/rapid/press-release\\_IP-09-1330\\_en.htm](http://europa.eu/rapid/press-release_IP-09-1330_en.htm)

<sup>33</sup> See footnote 1.

<sup>34</sup> See UEFA Media Release, 4 April 2014, Commissioner Almunia re-affirms financial fair play support, <http://uefa.com/news>. See also A. Vassiliou's speech at the informal meeting of EU sport ministers, Rome, 21 October 2014, [http://europa.eu/rapid/press-release\\_SPEECH-14-706\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-706_en.htm): "I have had the opportunity already to discuss the idea of Financial Fair Play with Michel Platini, president of the Union of European Football Associations (UEFA). I know the importance of this tool in promoting fairness of competitions and giving each team a chance. It is part of an overall policy to preserve the real values of football, its roots and what makes it a success. While money in sport is certainly welcome to help its development, it must not be at the expense of the very nature of sport. That is why Financial Fair Play (FFP) is in my view a key tool to ensure transparency and to promote better governance standards within sport. We wholeheartedly agree with the central objective of FFP, namely to "live within your means" or "break even", as it ensures prudent economic management that will serve to protect both the interests of individual clubs and players as well as the football sector in Europe as a whole".

- b) the Commission acknowledges that licensing systems are the responsibility of competition organizer, but it believes that it can play a facilitating role in the promotion of such systems in the exchange of good practices between representatives of the sport movement;
- c) licensing systems must be compatible with EU competition and the internal market provisions and should not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organization and conduct of sport.

On the other hand, in the first case where the compatibility of FFP with EU competition law is debated the Commission takes the view that there is no Community interest. What a peculiar attitude, one might be tempted to say.

That said, it seems that the Commission's decision to dismiss Mr Striani's complaint is formally based on the lack of Community interest, but it is mainly due to policy reasons. In other words, it would appear that the Commission did not want to handle the complaint simply to avoid any risk to assess as anti-competitive a rule that it has always supported.

### **3.3. The Commission's final decision.**

On 24 October 2014 the Commission formally dismissed the complaint. The reading of the decision confirms the doubts and critical remarks already illustrated. The Commission clearly affirms that the reason to dismiss the complaint:

“is that the Court of first instance (“the Brussels Court”) is well-placed to deal with matters (...) raised in [the] complaint in the framework of [the] civil action against UEFA. The Commission accordingly rejects [the] complaint against UEFA for reasons of priority setting, without taking a position on either [the] legitimate interest in filing the complaint or the merits of [the] complaint.”<sup>35</sup>

Moreover, in assessing Mr Striani's complaint the Commission follows the same arguments put forward in its previous letter.

In the light of what I have tried to illustrate this conclusion is not surprising and, in my opinion, is mainly due to the political implications of FFP and the relationships between European Commission and UEFA. Like it or not, UEFA represents a key partner of European Commission: the very recent cooperation agreement between the European commission and UEFA dated 14 October 2014 (*i.e.*, only 10 days before the Commission's final decision) is a clear signal of the political influence of UEFA, In this document, both the European Commission and UEFA recognize that:

“financial stability, transparency and better governance within sport can be pursued through responsible self-regulation. In this respect, and subject to compliance with competition law, measures to encourage greater rationality and discipline in club finances with a focus on the long-term as opposed to short-term,

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<sup>35</sup> See fn 2.

such as the Financial Fair Play initiative, contribute to the sustainable development and healthy growth of sport in Europe”.<sup>36</sup>

Although Art 5.4 of the agreement states that the arrangement does not create rights or obligations under international EU or domestic law, there is no doubt that the agreement represents a very strong political endorsement of FFP. As already mentioned, it is not surprising that, ten days later, the Commission declined to take a position on either Mr Striani's legitimate interest or the merits of the complaint and preferred to “pass the ball” to the national judge and, if necessary, to the CJ. In turn this attitude of the Commission seems to confirm the idea that also in the Commission's view the compatibility of FFP with EU competition law is not granted.

### **3.4. The Brussels Court judgment and the ECJ order**

On 29 June 2015 the Court of First Instance of Brussels delivered its judgment. In a very questionable and surprising decision the national judge has decided to declare itself incompetent for lack of jurisdiction. In particular, the Belgian court has argued that since UEFA is a private subject entered in the register of companies under the terms of Art 60 et seq of the Swiss civil code, pursuant to Art 2 of the Lugano convention “persons domiciled in a State bound by this convention shall, whatever their nationality, be sued in the courts of that State”. Moreover, according to the national judge in the case at issue it is not possible to invoke Art 5(3) of the Lugano convention since the addressees of FFP are clubs only. As a consequence the harm allegedly suffered by Mr Striani is an indirect consequence of the harm suffered by clubs. In such a situation the lack of a close link between the dispute and the place where the harmful event occurred or may occur makes Art 5(3) of the Lugano convention inapplicable. Despite this fact the Brussels court has decided to impose an interim order so as to stop the implementation of the so-called phase II of FFP where the acceptable deviation is reduced from €45 million to €30 million. In doing that the Belgian court has relied on Art 31 of the Lugano convention allowing a claimant to apply for provisional (including protective) measures as may be available under the law of that State even if, under the convention, the courts of another State bound by the convention have jurisdiction as to the substance of the matter. So far so good I would say.

However, the Brussels court has gone further and decided to make a reference to the ECJ for a preliminary ruling in order to know if FFP is consistent with EU principles on competition and internal market. As I have already said, this part of the judgment is rather questionable since Art 267 TFEU clearly states that any court of a Member State may request the ECJ to give a preliminary ruling only in case the national judge considers that a decision by the ECJ is necessary to enable it to give its judgment.

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<sup>36</sup> Commission decision of 14 October 2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA), C(2014) 7378 final, [http://ec.europa.eu/sport/news/2014/docs/uefa2014\\_en.pdf](http://ec.europa.eu/sport/news/2014/docs/uefa2014_en.pdf). See A. DUVAL, The new “Arrangement” between the European Commission and UEFA: A political capitulation of the EU, <http://www.asser.nl/SportsLaw/Blog/post/the-new-arrangement-between-the-european-commission-and-uefa-a-political-capitulation-of-the-eu>

However, in the Striani's case since the Belgian judge has already declared itself incompetent to give a judgment on the substance, it is difficult, if not impossible, to imagine how the requested preliminary ruling may be considered "necessary" to enable the national judge to give its own judgment. Similarly, as far as the interim measure is concerned, the national judge has already granted such a measure and therefore an outside observer could argue that the requested preliminary ruling is no more necessary. The simple fact that the Brussels court has granted the interim measure to safeguard the plaintiff's interests until the delivery of the ECJ preliminary ruling is not able to dispel all doubts relating to the admissibility of the reference. It is therefore not surprising that on 16 July 2015 the ECJ declared the reference for preliminary ruling manifestly inadmissible pursuant to Art 53(2) of its rules of procedure.<sup>37</sup> On the one hand the ECJ highlighted that the lack of international jurisdiction of the Brussels court makes the reference pointless;<sup>38</sup> on the other hand, the ECJ observed that the reference lacks of the necessary information to enable the ECJ to give its preliminary ruling.<sup>39</sup>

For this reason according to its press release dated 22 July 2015 UEFA affirmed that the, "European Court of Justice had for the first time the opportunity to consider the financial fair play system and has taken the view that the *Striani* case orchestrated in Belgium has no merits whatsoever".<sup>40</sup>

However we should never forget that:

- a) the Commission has dismissed the complaint lodged by Mr Striani on procedural grounds only (the lack of Community interest);
- b) the ECJ has declared the reference for preliminary ruling manifestly inadmissible: in other words, the ECJ did not rule on the substance of the case and dismissed it on procedural grounds.

As a consequence, to date there is no formal decision that has assessed the compatibility of FFP with EU law. From this point of view UEFA can only claim to have won a battle not the war.

#### 4. EU LAW AND SPORTING REGULATIONS.

Before analysing the break-even rule in light EU competition law, it is worthy to note that, broadly speaking, sporting activity is subject to the application of EU law. As far as competition law is concerned, in the *Meca Medina* judgment the ECJ has clearly rejected the relevance of the simple reference to "purely sporting rules" to remove the athlete or the sports association adopting the rule from the scope of Articles 101 and

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<sup>37</sup> "Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings".

<sup>38</sup> Case C-299/15, *Striani and others*, ECLI:EU:C:2015:519, points 29 and 30.

<sup>39</sup> *Ibid*, points 31, 34 and 35.

<sup>40</sup> UEFA press release 22 July 2015, UEFA welcomes European Court of Justice ruling on financial fair play, <http://www.uefa.org/protecting-the-game/club-licensing-and-financial-fair-play/news/newsid=2267061.html>

102 TFEU. As a consequence, where engagement in the activity must be assessed in the light of the Treaty provisions relating to competition, it is necessary to determine, given the specific requirements of Art 101 and 102 TFEU, whether the rules which govern that activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between Member States. Therefore, even if those rules do not constitute restrictions on freedom of movement because they concern questions of purely sporting interest and, as such, have nothing to do with economic activities, that fact means neither that the sporting activity in question necessarily falls outside the scope of EU competition rules nor that the rules do not satisfy the specific requirements of Art 101 and 102 TFEU.<sup>41</sup>

Moreover, on the basis of the principles set out in the *Wouters* judgment,<sup>42</sup> to assess whether a rule adopted by a sports association relating to the organisation of sport infringes EU competition law it is necessary to answer the following four questions:

- a) is the sports association that adopted the rule to be considered an “undertaking” or an “association of undertakings”?
- b) does the rule in question restrict competition within the meaning of Article 101(1) TFEU or constitute an abuse of a dominant position under Article 102 TFEU?
- c) is trade between Member States affected?
- d) does the rule fulfil the conditions of Article 101(3) TFEU?

In particular, as far as question b) is concerned, in the *Wouters* case the ECJ has ruled that not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 101(1) of the Treaty. For the purposes of application of that provision to a particular case, account must be taken of:

- i) the overall context in which the rule was adopted or produces its effects and its objectives;
- ii) whether the restrictions caused by the rule are inherent in the pursuit of the objectives;
- iii) whether the rule is proportionate in light of the objective pursued.

#### **4.1. EU law and UEFA's rules on licensing and monitoring requirements.**

It is interesting to note that in the 2007 White Paper on sport the Commission did not address the problem of which objectives of sporting rules can be deemed legitimate.<sup>43</sup> The Commission simply affirmed that according to ECJ's case law and the

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<sup>41</sup> Case C-519/04P, *David Meca-Medina and Igor Majcen v Commission of European Communities*, [2006] ECR I-6991.

<sup>42</sup> Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para 97 ss.

<sup>43</sup> White Paper on Sport of 11 July 2007, presented by the European Commission to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee, COM(2007) 391 final.

Commission's decisions there are organisational sporting rules that – based on their legitimate objectives – are likely not to breach the EU anti-trust provisions, provided that their anti-competitive effects, if any, are inherent and proportionate to the objectives pursued. Examples of such rules are the “rules of the game” (*e.g.*, rules fixing the length of matches or the number of players on the field), the rules concerning selection criteria for sport competitions, the so-called “at home and away from home” rules, the rules preventing multiple ownership in club competitions, the rules concerning the composition of national teams, anti-doping rules and rules concerning transfer periods. On the contrary, in the following 2011 Communication on developing the European dimension of sport the Commission expressly affirmed that legitimate objectives pursued by sport organisations may relate, for example, to the fairness of sporting competitions, the uncertainty of results, the protection of athletes' health, the promotion of the recruitment and training of young athletes, financial stability of sport clubs/teams or a uniform and consistent exercise of a given sport (the “rules of the game”).<sup>44</sup>

The topic concerning the relationship between the UEFA club licensing and monitoring rules and EU law has been further addressed by the Commission on two occasions.

Firstly, in the 2009 EU conference on licensing systems for club competition the Commission highlighted the following points:

- a) the set of criteria to be fulfilled in order to take part in a sport competition is often referred to as a licensing system;
- b) the main aim of such criteria is to ensure that club remain solvent throughout the course of competition;
- c) licensing system may be viewed as a necessary tool for the smooth functioning of the traditional European model of sport;
- d) licensing systems generally aim to improve governance in sport and to maintain the integrity of competitions by ensuring that all clubs involved in a given competition respect the same basic rules on financial management and transparency;
- e) financial criteria are the heart of licensing systems and their primary aim is to ensure that no club drops out of the competition for finance-related reasons;
- f) financial criteria included in licensing systems also aim to reduce inequality in revenue distribution among clubs participating in the same competition;
- g) licensing systems must be compatible with EU competition and internal market provisions and should not go beyond what is necessary for the pursuit of a legitimate objective relating to the proper organization and conduct of sport.

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<sup>44</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Developing the European Dimension in Sport, COM(2011) 12 final.

Secondly, the specific issue of the FFP rules has been the object of a joint statement by Commission's Vice-President Almunia and UEFA's President Platini on 21 March 2012.<sup>45</sup> Basically, the Almunia-Platini joint statement contains a partially new list of the objectives of FFP:

- a) to improve the economic and financial capability of clubs;
- b) to increase transparency and credibility;
- c) to improve governance standards in football;
- d) to encourage clubs to operate on the basis of their own revenues;
- e) to protect the integrity and smooth running of UEFA club competitions;
- f) to encourage responsible spending for the long term benefit of football;
- g) to protect the long-term viability and sustainability of European club football.

It is worthy to note that this list of objectives differs, although slightly, from the objectives of FFP as listed in Art 2(2) of the UEFA club licensing and fair play regulations. As a matter of fact, the abovementioned list does not refer to the objective of placing the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually (Art 2(2)c)); on the contrary, the list refers to the improvement of the governance standards in football and the protection of the integrity and smooth running of UEFA club competitions which are objectives mentioned in Art 2(1) of the UEFA club licensing and fair play regulations as part of the specific objectives of the UEFA club licensing mechanism.

Apart from such differences, the Almunia-Platini joint statement highlights the following further points:

- a) UEFA will promote these objectives in accordance with the framework of EU law;
- b) these objectives are consistent with the aims and objectives of EU policy in the field of State aid;
- c) the financial regulation by UEFA and the State aid rules by the Commission pursue broadly the same objectives of preserving fair competition between football clubs.

If one tries to summarize the different objectives listed both in the UEFA club licensing and fair play regulations and in the Almunia-Platini joint statement, it is possible to identify at least nine objectives related to FFP:

- |   |
|---|
| 1) Improving the economic and financial capability of the clubs, increasing their transparency and credibility.   |
| 2) Placing the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs |

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<sup>45</sup> See fn 1.



punctually.
3) Introducing more discipline and rationality in club football finances.
4) Encouraging clubs to operate on the basis of their own revenues.
5) Encouraging responsible spending for the long-term benefit of football.
6) Protecting the long-term viability and sustainability of European club football.
7) Improving governance standards in football.
8) Protecting the integrity and smooth running of UEFA club competitions.
9) Preserving fair competition between football clubs.

They are all laudable objectives and it is very difficult to define a hierarchy.<sup>46</sup> From a literal point of view it is probably correct to say that the protection of the long-term viability and sustainability of European club football as well as the protection of the integrity and smooth running of UEFA club competitions represent two fundamental and long-run objectives whilst the others play the role of instrumental objectives, that is short-run objectives through which it is possible to achieve the fundamental objectives.<sup>47</sup>

## 5. THE *WOUTERS* TEST APPLIED TO UEFA FINANCIAL FAIR PLAY.

According to *Meca-Medina* and *Wouters* case-law,<sup>48</sup> to assess whether a rule adopted by a sports association relating to the organisation of sport infringes EU competition law it is necessary to answer four fundamental questions.

### 5.1. Is UEFA an association of undertakings?

There should be no problem to argue that UEFA is an association of undertakings pursuant to Art 101(1) TFEU. Generally speaking, according to the ECJ's case-law the concept of undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed; moreover, an activity of an economic nature means any activity, whether or not profit-making, that involves economic trade.<sup>49</sup> More specifically, as far as sport associations are concerned, in the *Laurent Piau* judgment the General Court has stated that it is common

<sup>46</sup> According to N. PETT, *Financial fair play or an oligopoly of football clubs*, Oxera Agenda, 2014, p. 1 “at first glance, there are sound justifications for the break-even rule. In using it, UEFA seeks to guarantee the long-term financial stability of the clubs by forcing them to ‘keep their wage bill under control’ by ‘lowering salary costs and/or limiting the number of players under contract. In other words, the idea is to reduce ‘player costs’ (e.g. transfer fees, agents’ fees and wages), which have exploded in recent years. Moreover, the break-even requirement is claimed to help promote a competitive balance among clubs, by making sure they compete ‘on an equal footing’. In short, the idea is to prevent ‘fake’ financial competition from taking precedence over ‘true’ sports competition”.

<sup>47</sup> See J.C. MÜLLER, J. LAMMERT, G. HOVEMANN, *The Financial fair Play Regulations of UEFA: An Adequate Concept to Ensure the Long-Term Viability and Sustainability at European Club Football?*, p. 121.

<sup>48</sup> See fn 5 and 42.

<sup>49</sup> Case C-41/90, *Hofner and Elser v Macroton GmbH*, [1991] ECR I-1979, para. 21.

ground that FIFA's members are national associations, which are groupings of football clubs for which the practice of football is an economic activity. These football clubs are therefore undertakings within the meaning of Article 101 TFEU and the national associations grouping them together are associations of undertakings within the meaning of that provision. Since the national associations constitute associations of undertakings and also, by virtue of the economic activities that they pursue, undertakings, FIFA, an association grouping together national associations, also constitutes an association of undertakings within the meaning of Article 101 TFEU. As regard UEFA, according to the Commission football clubs engage in economic activities and they are undertakings within the meaning of Art 101 TFEU; since the membership of the national football associations consists of those football clubs the national football associations are therefore associations of undertakings within the meaning of Art 101 TFEU; the national football associations are also undertakings themselves in so far as they engage in economic activities; since the members of UEFA are the national football associations UEFA is therefore both an association of associations of undertakings as well as an association of undertakings; UEFA is moreover an undertaking in its own right as it also engages directly in economic activities.<sup>50</sup>

## 5.2. - Does the rule in question restrict competition?

The break-even rule clearly affects competition. According to Striani's lawyer and several scholars, the break-even rule is likely to reduce the level of players' salaries which, in turns, can result in a deflationary effect on the revenues of players' agents. Moreover, the break-even rule amounts to a relative salary cap and a restriction of investments in the sense that the more a club enjoys high relevant revenues, the more it can spend on players. If one considers that several studies have shown that there is a strong and direct relationship between the financial means of a club and its success on the pitch (the more you spend, the more you win),<sup>51</sup> it is easy to realize that the break-even rule is likely to protect bigger clubs by introducing a barrier to entry and, consequently, reinforcing their competitive position on the market.

However, in order to assess if the UEFA FFP discipline restricts competition, according to the *Wouters* test one must take into account:

- i) the overall context in which the rule was adopted or produces its effects and its objectives;
- ii) whether the restrictions caused by the rule are inherent in the pursuit of the objectives;

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<sup>50</sup> Case T-193/02, *Laurent Piau v Commission of the European Communities*, [2005] ECR II-209. See also: Commission Decision of 27 October 1992 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.384 and IV/33.378 - Distribution of package tours during the 1990 World Cup), *OJ L* 326, 12 November 1992, p. 31; Commission Decision of 28 Mar 2002, IV/36 583-SETCA-FGTB/FIFA, [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/36583/36583\\_54\\_3.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/36583/36583_54_3.pdf)

<sup>51</sup> *The A.T. Kearney EU football sustainability study*, [www.atkearney.com/index.php/Publications/the-at-kearney-eu-football-sustainability-study.html](http://www.atkearney.com/index.php/Publications/the-at-kearney-eu-football-sustainability-study.html); UEFA, *The European club footballing landscape. Club licensing benchmarking report financial year 2008*, [www.uefa.com](http://www.uefa.com)

iii) whether the rule is proportionate in light of the objective pursued.

There seems to be no doubt about the fact that the abovementioned objectives pursued by the UEFA FFP can be deemed laudable and legitimate. Although to date the ECJ has never ruled on the legitimacy of any of such objectives (but for the case of the integrity of sport competitions),<sup>52</sup> nobody can seriously contest that improving the economic and financial capability of the clubs, increasing their transparency and credibility, placing the necessary importance on the protection of creditors and to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually, introducing more discipline and rationality in club football finances, encouraging clubs to operate on the basis of their own revenues, as well as encouraging responsible spending for the long-term benefit of football, protecting the long-term viability and sustainability of European club football, improving governance standards in football, protecting the integrity and smooth running of UEFA club competitions and preserving fair competition between football clubs are all legitimate objectives in terms of EU law. Nevertheless, the objective of encouraging clubs to operate on the basis of their own revenues raises some doubts. Firstly: from a literal point of view the break-even rule *imposes* (not simply *encourages*) clubs to operate on the basis of their football revenues. In other words, clubs are free not to comply with the break-even rule in theory only; in practice, if they want to avoid UEFA sanctions, they must respect the break-even rule. Secondly: the idea that limiting the relevance of private funding in the football sector amounts to a legitimate objective is rather questionable.

Look at scenarios 1 and 2:<sup>53</sup>

**Scenario 1**

Reporting period	T-2	T-1	T
Annual break-even result (€m)	-25	-20	-5
Aggregate break-even result for monitoring period (€m)	-50		
Aggregate break-even result for T-3 and T-4 (€m)	+20		
Adjusted aggregate break-even result across T-4 to T (€m)	<b>-30</b>		
Covered or not covered?	Covered	<b>NOT COVERED</b>	

<sup>52</sup> Case C-519/04P, *David Meca-Medina and Igor Majcen v Commission of European Communities*; European Commission - IP/02/942, 27 June 2002, Commission closes investigation into UEFA rule on multiple ownership of football clubs.

<sup>53</sup> The two scenarios in the text are extracted from [www.hns-cff.hr/upl/products/UEFA\\_Club\\_Licensing\\_Presentation.pdf](http://www.hns-cff.hr/upl/products/UEFA_Club_Licensing_Presentation.pdf). See also S. BASTIANON, *Dal Trattato di Lisbona al nuovo regolamento UEFA sulle licenze per club e sul fair-play finanziario*, *Riv. Dir. Sport.* [2013], p. 7.

Conclusion	Break-even requirements are fulfilled	<b>Break-even requirements are not fulfilled</b>
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## Scenario 2

Reporting period	T-2	T-1	T
Annual break-even result (€m)	-25	-35	-10
Aggregate break-even result for monitoring period (€m)	-70		
Aggregate break-even result for T-3 and T-4 (€m)	+10		
Adjusted aggregate break-even result across T-4 to T (€m)	<b>-60</b>		
Covered or not covered?	<b>COVERED</b>	Not Covered	
Conclusion	<b>Break-even requirements are not fulfilled</b>	Break-even requirements are not fulfilled	

If one compares scenario 1 and scenario 2 it is very clear that for UEFA a case where a club cannot cover an aggregate loss of EUR 30 million is equal to the case where a club (by virtue of external funding) can cover an aggregate loss of EUR 60 million. Not only the logic behind such a rule is unclear, but the rule itself amounts to a discrimination as two different situations are treated in the same way.

Moreover, the legitimacy of the objective of encouraging clubs to operate on the basis of their own revenues raises further concerns. Generally speaking absolute salary caps represent a means to re-establish a financial balance among clubs that, in turns, will lead to a competitive balance. In other words, the rationale supporting absolute salary caps is competitive balance. However, apart any evaluation about the legitimacy of the aim of encouraging competitive balance, it is quite surprising to note that:

- a) UEFA has introduced a rule amounting to a *sui generis* (relative) salary cap whilst it has not listed the competitive balance among the aims pursued by that rule;
- b) in any case the relative nature of salary cap introduced by UEFA is not likely to achieve the goal of competitive balance because richer/larger clubs could always spend on players' salaries more than smaller/poorer clubs, increasing the competitive imbalance among European football clubs.<sup>54</sup>

<sup>54</sup> According to J.G. MAXCY, *The American View on Financial Fair Play* (January 20, 2014). ESEA Conference Volume. O. BUDZINSKI, A. FEDDERSEN, (Eds.) Oxford, UK: Peter Lang International Academic Publishers, 2014. Available at SSRN: <http://ssrn.com/abstract=2405241>, p. 5 “the broad spending restraints of FFP are actually likely toacerbate competitive imbalance, restrict the chances of underdogs to improve their lot, and generally make football leagues more predictable (less interesting?). Moreover, FFP directly discourages investment in football clubs and leagues so the overall result is likely a reduction in consumer welfare”.

In this context, when one tries to apply the *Wouters* test to FFP the main problem to cope with is represented by the inherent and proportionate nature of the rule in the light of the objectives pursued. In other words, to pass the *Wouters* test UEFA has to prove that the objectives pursued through the FFP cannot be attained by means of less restrictive measures.

As regards the inherent character of the rule, frankly speaking I cannot see how the break-even rule can be deemed inherent to any of the FFP's objectives. External funding by "sugar daddies" as such has nothing to do with the transparency and credibility of the clubs. Similarly, the relationship between external funding and integrity, long-term viability and sustainability is far from obvious and clear. In order to ensure that clubs settle their liabilities with players, social/tax authorities and other clubs punctually the break-even rule is meaningless, being more relevant the (enhanced) provisions concerning the so-called no overdue payables. To introduce more discipline and rationality in football clubs finances one should establish first how much more discipline and rationality is required, since the word "more" as such means everything and nothing. The same is true as regards the objective to encourage responsible spending for the long-term benefit of football. In other words, UEFA should explain how responsible the spending must be in order to assure the long-term benefit of football; failing such an explanation any reasoning risks being meaningless. As regards the other objectives (protecting the long-term viability and sustainability of European club football, improving governance standards in football, protecting the integrity and smooth running of UEFA club competitions, preserving fair competition between football clubs) they are so wide and generic that almost any and no rule can be considered inherent to them; therefore, no decisive argument can be derived in support of the break-even rule.

The same is true if one considers the proportionate nature of the rule in the light of the abovementioned objectives. The break-even rule aims at fighting against overinvestments in football in the spirit of more responsible spending. However, in football overinvestments in talent are mainly due to the already mentioned principle "the more you spend, the more you win" strictly linked to the actual mechanism of allocation of broadcasting rights where the more you win, the more you get. From this point of view, the idea to change such a mechanism in order to try to reduce revenue differentials should be taken into consideration. Similarly, if the problem UEFA wants to combat is financial doping (that is, the situation where clubs spend money they do not have, get into debt and ultimately go bankruptcy) the no overdue payable rule alone can represent the more correct answer. If necessary, the no overdue payables rule could be combined with a break-even rule where external funding/equity-increasing injections are considered as relevant income.<sup>55</sup>

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<sup>55</sup> O. BUDZINSKI, *The competition economics of financial fair play*, Ilmenau University of Technology, Institute of Economics, 2014, Discussion Paper 85, p. 16.

### 5.3. Is trade between Member States affected?

According to the ECJ's case-law the notion of trade between Member States is very broad as, "it is not limited to traditional exchange of goods and services. It is a wider concept, covering all cross-border economic activity, including establishment".<sup>56</sup> From this point of view there is no doubt that football players' services are comprised in the notion of trade provided for by Art 101(1) TFEU and that these services are traded across Member States. Moreover, in the *Bosman* case, Advocate General C.O. Lenz stated that the UEFA rule on transfer of players was likely to affect trade between Member States. We all know that each year many football players move from a club to another one, from a league to another one. As we have said, the break-even rule caps the amount of money clubs can spend for players and therefore it is likely to affect the mobility of players across Member States. As far as the notion of appreciability of the effect on trade between Member States is concerned, according to the Commission there is a rebuttable presumption that in case the market share of the relevant parties within the Union is less than 5% and turnover of these parties is below EUR 40 million the agreement will not appreciably affect trade. However, if one consider that FFP can be labelled as a decision of an association of undertakings (UEFA) and that UEFA governs the professional football in Europe in a monopolistic way, it is quite easy to conclude that the break-even rule is likely to appreciably affect trade between Member States.

### 5.4. Does the rule fulfil the conditions of Article 101(3) TFEU?

Pursuant to Art 1(2) of Regulation No 1/2003 agreements, decisions and concerted practices caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU shall not be prohibited, no prior decision to that effect being required. The four cumulative conditions laid down in Art 101(3) TFEU are as follows:

- a) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- b) the agreement must allow consumers a fair share of the resulting benefit;
- c) the agreement does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- d) the agreement does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The first condition relates directly to the ability of FFP to produce efficiency gains, in terms of both cost efficiency and qualitative efficiency. In this regard one could argue that the break-even rule is likely to result in cost efficiencies in the sense that it forces clubs to reduce their spending for talent to the level of their relevant income. Unfortunately such a cost efficiency cannot be taken into account. The settled case-law of the CJ states clearly that only objective benefits can be taken into account and

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<sup>56</sup> Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, *OJ*, 27 April 2004, C 101/81.

therefore cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. UEFA could also argue that the break-even rule is likely to generate qualitative efficiencies because it increases the financial stability of football clubs and reduces the risk of clubs going bankrupt. In turn, this increases the quality of the product offered because it avoids (or reduces) the problems related to the collapsing of a club during the season. I admit that such an argument is not totally groundless. However, it is clear that UEFA cannot simply argue that the break-even rule is likely to produce the abovementioned efficiencies, it has to fully demonstrate the link between the break-even rule and the claimed efficiencies, the likelihood and the magnitude of such efficiencies. Although it is not possible to deny the potential relevance of such line of argument, to date it still seems very speculative and lacking in sound economic data.

The second condition of Art 101(3) TFEU deals with the relationship between efficiencies and consumers. In other words, consumer must receive a fair share of the efficiencies generated by the (restrictive) agreement. We have already illustrated that the deflationary effect on players' salaries caused by the break-even rule could force top football players to look for more remunerative contracts in countries outside the range of influence of UEFA regulations. In such a case it is arguable that less talent in European championship is likely to negatively affect consumer welfare.

The third condition of Art 101(3) TFEU states that the agreement must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of these objectives. According to the Commission's Guidelines on the application of Article 101(3) TFEU this condition implies a two-fold test.<sup>57</sup> Firstly, the restrictive agreement must be reasonably necessary in order to achieve the efficiencies. Secondly, the individual restrictions of competition that flow from the agreement must also be reasonably necessary for the attainment of the efficiencies. In other words, this condition is fulfilled only where the undertakings concerned can demonstrate that there are no other economically practicable and less restrictive means of achieving the efficiencies. Apart any remark on the actual lack of sound economic data concerning the claimed efficiencies, we have already illustrated that there are at least two less restrictive alternatives (*i.e.*, the no overdue payables rule and the break-even rule provided that external funding are not excluded from the notion of relevant income) and to date, as far as I know, no one has argued that these less restrictive alternatives are not workable. Moreover, if UEFA argues that the break-even rule is the only measure able to attain the claimed efficiencies, UEFA should also explain why the break-even rule will entry into force in its entirety only after season 2017/2018. Without this fundamental clarification, any defence appears speculative and groundless.

The fourth condition of Art 101(3) TFEU states that the agreement must not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products concerned. The football clubs' main sources of revenues are:

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<sup>57</sup> Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, *OJ*, 27 April 2004, C 101/96.

- i)* match-day;
- ii)* TV broadcasting rights;
- iii)* sponsorship and other commercial income;
- iv)* external funding.

External funding is the only source of revenue not strictly linked to sporting success. For this reason, external funding represents the easiest way for a club to increase its revenues and, consequently, its ability to spend for talent. By excluding external funding from the notion of relevant income UEFA limits the ability of clubs to spend for the best players. Although this implies an evident restriction of competition among clubs for talent, probably FFP is not likely to eliminate at all competition in the market of football players. Certainly it affects competition among clubs, especially as regards small clubs vis-à-vis top clubs putting the former in a weaker position to compete with the latter but, at least in theory, competition is not eliminated.

## 6. CONCLUSIONS.

The first attempt to challenge UEFA's financial fair play regulations has been defeated on procedural (*i.e.*, priority) grounds. However, the Commission's decision to dismiss the complaint as well as the arguments put forward by the Commission to support the decision raise many questions. On the one hand the lack of legitimate interest of the individual complainant does not prevent the Commission to take up the case *ex officio*; on the other hand, the alleged absence of Community interest as regards the Striani's complaint is rather questionable since this argument is exclusively based on the alleged better position of the national judge to handle the case.

Similarly the civil action before the Brussels court was concluded without a judgment on the substance of the compatibility of FFP with EU law simply because of the lack of jurisdiction of the national judge and the inadmissibility of the reference for preliminary ruling due to the lack of the necessary information to enable the ECJ to address the issues relating to EU law.

In this article I have tried to express the view that:

- a) the objectives of FFP as expressed by UEFA can be seen laudable and, by and large, legitimate as far as EU law is concerned, although I have addressed some critical remarks as far as the goal of encouraging clubs to operate on the basis of their own resources is concerned;
- b) the break-even rule represents a horizontal price-fixing agreement between competitors which takes the form of an indirect and relative salary cap;
- c) the break-even rule is likely to affect competition in so far as it reduces the amount of money football clubs may spend on player salaries, thus limiting investments;
- d) to date there is no conclusive evidence that FFP is necessary to reach its objectives in the sense that there would be no less restrictive alternatives.



In this context, the Commission's dismissal of the complaint on priority grounds is formally legitimate, although to some extent critical in terms of law as well as of policy.

As far as the law is concerned, the Commission is saying that the problem of the compatibility of FFP with EU competition law has no Community interest. However, it is possible to say everything and the opposite of everything on FFP and its compatibility with EU competition rules. One can argue that:

- i)* it restricts/does not restrict competition;
- ii)* its objectives are/are not legitimate;
- iii)* its effects are/are not inherent and proportionate in respect of the objectives pursued;
- iv)* the conditions of Art 101(3) TFEU are/are not fulfilled.

The only thing one cannot reasonably argue is that there is no Community interest.

As far as the policy is concerned, an outside observer could reasonably think that the Commission is not fully convinced of the legitimacy of FFP but does not want to be first to clearly say it because of a kind of deference towards UEFA.

The ECJ order adds nothing to this scenario simply because it did not assess the substance of the case. Unlike the *Bosman* case, in the *Strianai* case ECJ was unable to score the decisive goal. However there is reason to believe that the game is not over yet.