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**EU Competition Law analysis of football transfer
fees**

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Poděkování

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*“FIFA has accepted that players will no longer be sold for exorbitant sums of money.”¹
- The Guardian, September 2000*

*“Elite clubs will prey on desperate ones in the hunt for bargains as the game reels from its
biggest financial hit since the 1930s”²
-The Guardian, May 2020*

Introduction

The two very different messages of The Guardian published twenty years apart illustrate what the expectations were at the time of the aftermath of *Bosman*,³ and what the sentiment is around the football transfer market in current times. 15th December 2020 marked 25 years from when the *Bosman* case dramatically changed the landscape of professional sports by stating that the practice of demanding transfer fees for players out of contract was unlawful. On the other hand, fees for transfers of players still under contract were left untouched by the Court. However, the new, post-Bosman system that was agreed on by the football’s stakeholders and the European Commission in 2001 sought to replace the transfer fee system as well.

And yet, supporters of the beautiful game find themselves witnessing more and more money spent on transfer fees, even considering the growth of the football market. Whereas football revenues in Europe grew from €16.2 billion in the 2010/11 season⁴ to €28.9 billion in the 2018/19 season,⁵ representing a 71% increase, transfer fees for just international transfers in that same period grew from €3 billion⁶ to €6.25 billion,⁷ a 108.3% increase.⁸ The results represent a 52% difference between transfer fees growth and football market growth, showing that transfer fees did not grow proportionally to revenues. The sentiment is that not everything is quite right, as doubts were

¹ The end of transfers? It won't come easily. *The Guardian*, [online], <https://www.theguardian.com/football/2000/sep/03/newsstory.sport24> [Accessed 27 July 2021].

² PSG's record £198m splurge on Neymar will stand for years as symbol of crisis. *The Guardian*, [online], <https://www.theguardian.com/football/2020/may/09/psgs-record-198m-splurge-on-neymar-will-stand-for-years-as-symbol-of-crisis> [Accessed 27 July 2021].

³ Case C-415/93, *Bosman*, [1995] EU:C:1995:463.

⁴ Deloitte Annual Review of Football Finance, 2012, p. 8.

⁵ Deloitte Annual Review of Football Finance, 2020, p. 8.

⁶ KEA and CDES, (2013) *The Economic and Legal Aspects of Transfer of Players*, Report for the European Commission., p. 4.

⁷ FIFA Transfer Matching System Global Transfer Market Report 2019, p. 13.

⁸ Even though European revenues are compared to worldwide international transfers, this comparison is applicable since European clubs feature in the vast majority of transfers, see: FIFA Transfer Matching System Global Transfer Market Report 2019, p. 26. The difference could be even more contrasting since the transfer fee total does not include domestic transfers, because those are not reported in the FIFA Transfer Matching System.

voiced for example by Pearson.⁹ Egger and Stix-Hackl voiced misgivings about the new system from the start.¹⁰ This inspired me to write a thesis to explore whether this sentiment is justified.

Transfer fees are not a natural employment phenomenon of labor law. They can best be approximated to a payment which enables a player otherwise held to his temporary contract buy out of the contract and become employed at another employer. In this context, the transfer system is fittingly described as a no-poaching agreement.¹¹ Though it is often other clubs seeking to employ a player who buy them out. It is doubtful whether this practice, arguably detrimental for employees who make their living by playing football, can be justified on sporting grounds.

As competition law becomes increasingly more preferred method of analysis of the Court of Justice, and the negative competition effect arising from increased spending on transfer fees recognized by the European Commission, there is an increasing doubt whether the system would stand up to a challenge. FIFPro, the association of players, believed that the transfer system was anti-competitive, and lodged a complaint before the European Commission. Although FIFPro withdrew the complaint following an agreement with FIFA over modifications to the transfer system, a six-year deadline was set since the agreement, expiring in 2023.¹² This could mark an opportunity for the Court¹³ to examine the system on competition grounds, after not having done so in *Bosman*.

To my best knowledge, this is the first complex legal overview that follows the established structure of judicial competition analysis¹⁴ and considers the recent events. Both economic^{15,16} and

⁹ Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System', *European Law Journal*, 21(2), p. 228 et seq.

¹⁰ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 90-91.

¹¹ By Hoey et. al. in Hoey, S. et al. (2021) The transfer system in European football: A pro-competitive no-poaching agreement? *International journal of industrial organization*, 75.

¹² FIFPro drops bid to outlaw the transfer system as FIFA agrees to a review and gives players right to cancel contracts if clubs refuse to pay them. *Daily Mail*, [online] <https://www.dailymail.co.uk/sport/article-5055015/FIFPro-drops-bid-against-FIFA-outlaw-transfers.html> [Accessed 27 July 2021].

¹³ The Court of Justice of the European Union (CJEU) includes Court of Justice, the General Court, and special courts per Article 19 of the Treaty on the European Union, as well as their predecessors unless specified otherwise.

¹⁴ As established by Case C-519/04 P *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

¹⁵ On pro-competitive effects of the transfer system, see Hoey, S. et al. (2021) The transfer system in European football: A pro-competitive no-poaching agreement? *International journal of industrial organization*, 75.

¹⁶ On talent development, see Norbäck, P. J., et al. (2021) Talent development and labour market integration in European football. *The World Economy*, 44(2), p. 401 et seq.

legal^{17,18} literature has explored parts of the transfer system. The closest legal literature are the opinions of advocate generals in *Bosman*¹⁹ and *Balog*,²⁰ as well as a study done for the European Commission.²¹

This thesis seeks to add to the existing literature by analyzing the transfer system with the approach that the Court of Justice employed in recent case law²², as if the system was challenged on competition grounds. This is in part motivated by an anticipation of a possible challenge before the Court of Justice on competition grounds. The thesis is based on two main hypotheses. The first hypothesis is that the transfer fee regulation is not compliant with Article 101 of the Treaty on the Functioning of the European Union (TFEU) based on the restrictions it presents to the player supply market. The second hypothesis is that the transfer fee regulation amounts to abuse of dominance within the meaning of Article 102 TFEU. This is based on the assumption that the clubs, which are together in the position of dominance, benefit from the system in its current state, and it is in their interest to prevent any changes that would improve competition to the detriment of the already dominant clubs.

This thesis is divided into two main chapters. Chapter 1 presents the rules of the transfer system so that they may be subjected to the analysis. In addition, the context is presented for understanding why the development was such as it was. Chapter 2, which is the heart of this thesis, performs the analysis itself. The analysis is structured in a way that for every step, a rule is presented and then directly applied. The analysis considers whether the transfer fees as a part of the transfer system present a restriction to competition or an abuse of dominant position, explores possible justification, and discusses circumstances which would change the outcome of the analysis.

¹⁷ On contract stability, see Parrish, R. (2015) Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law. *Maastricht Journal of European and Comparative Law*, 22(2), p. 267.

¹⁸ On general assessment of compliance from the perspective of both freedom of movement and competition law, see Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System', *European Law Journal*, 21(2), p. 228 et seq.

¹⁹ Opinion of AG Lenz in Case C-415/93 *Bosman* ECR 1995 I-4921.

²⁰ The opinion to *Balog* was never published, since the case was withdrawn before a judgment has rendered. However, AG Stix-Hackl later co-authored an article that is presumed to contain the rationale for the unpublished opinion. See Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002.

²¹ KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission.

²² Most recently Case T-93/18, *International Skating Union v Commission* [2020] EU:T:2020:610.

1 The overview of the transfer system

This chapter presents the overview of the system in which transfer fees are set. In order to understand the way football is governed, the European model of sport is presented (Chapter 1.1), and the relevant regulation of transfer fees is presented subsequently (Chapter 1.2).

1.1 The European model of sport

In Europe, sport undoubtedly enjoys a long tradition. The resulting manifest of European sporting culture is what is called the European model of sports. It is a collection of core values associated with sports, which describes how sport is seen in Europe. Its utility lies in contrasting the European sport culture with other approaches, most notably the North American sport culture. Nevertheless, it is rather a general representation rather than a precise description of reality. Moreover, it does not even apply to all European sports.²³ Clearly, due to the diverse and complex nature of European sporting structures in different sports, it is unfeasible to define a unified model of organization. EU bodies have, however, repeatedly highlighted the importance of the European sports model by specifying their idea about which values and features should be pursued by policy and regulation.

In 1999, the European Commission published a consultation document where some of the key features were identified.²⁴ Same year, the European Commission affirmed some of them in the Helsinki Report.²⁵ As a response, the European Council confirmed its stance on values attached to the European model in the Nice Declaration on Sport.²⁶ European Parliament stressed the attachment to the European model in its 2007 resolution on the future of professional football in Europe.²⁷ Finally, the White Paper on Sport puts some of these features in the economic and social

²³ It generally applies to team sports rather than individual sports. For example, in boxing, events are organized by several organizations contrary to the traditional system of one governing body for the sport. However, even some team sports substantially diverge from this structure, such as rugby.

²⁴ European Commission (1998), *“The European Model of Sport”*, Consultation Document of DG X.

²⁵ European Commission (1999), *Report from the Commission to the European Council with a View to Safeguarding Current Sports Structures and Maintaining the Social Function of Sport Within the Community Framework, The Helsinki Report on Sport*”, COM (1999) 644 final.

²⁶ European Council (2000), *“Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies”* No. 13948/00.

²⁷ European Parliament (2007) *“Resolution of 29 March 2007 on the future of professional football in Europe”* (2006/2130(INI)).

context.²⁸ This serves to show that all relevant bodies of the EU have accepted the notion of the European model of sports and chose to pursue values associated with it.

What are these values then? The European Commission's consultation document identifies six core values, which define the European model. These are (i) the pyramid structure, (ii) the system of promotion and relegation, (iii) grassroots involvement, (iv) national identity, (v) international competitions, and finally negative aspects which are present as a byproduct of the other values, but nevertheless form the European model as well. While a detailed discussion of the European sports model is outside the scope of this thesis, the pyramid structure and the open system of promotion and relegation are presented further as they provide insight to the broader context of transfer fee regulation.²⁹

1.1.1 The pyramid structure

The organization of sports is aptly described as the pyramid. The pyramid is a single structure, which unifies all participants in the competition within a single structure. At the bottom of the pyramid, there are the largely independent clubs, both professional and amateur, competing in various leagues based on their performance. The clubs within each country are all members of the national federation, the sole regulatory body at the national level, which organizes the national competition in a monopolistic fashion, and which has the competence to regulate itself. National federations, one for each country, are in turn members of regional confederations. Regional confederations, usually organized roughly by continent, regulate the sport at the regional level and organize regional competitions. Finally, regional confederations are associated with the international federation, which organizes international competitions and regulates the sport on a global level.³⁰

This one-federation-per-sport structure puts the federations in an apparent monopolistic position. According to Nafziger, the primary function of the pyramid structure is to facilitate revenue

²⁸ Nafziger, J.A. (2008) A comparison of the European and North American models of sports organization, *The International Sports Law Journal*, 3-4, pp. 100–108.

²⁹ For further reference on structural models of sport, see for example Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, pp. 36 et seq., or Nafziger, J.A. (2008) A comparison of the European and North American models of sports organization, *The International Sports Law Journal*, 3-4, pp. 100–108.

³⁰ Nafziger, J.A. (2008) A comparison of the European and North American models of sports organization, *The International Sports Law Journal*, 3-4, pp. 100–108.

distribution to encourage mass participation and competitive balance among clubs.³¹ On top of that, I submit that a global regulation, providing unified rules and competition calendars enhances the value of the product that most stakeholders receive.³²

1.1.2 Promotion and relegation

The European system is open. Any new club that meets certain criteria can become part of the competition. The competition itself is differentiated into various leagues, in which clubs compete based on their performance. Clubs can be promoted to a higher league or relegated into a lower league based on their performance and the scheme employed by their national federation. The best performing clubs are entitled to take part in international competitions.³³ Other than based on sporting merits, national leagues may enforce ethical principles of the competition by imposing the sanction of relegation on clubs which break the rules of the competition.³⁴

At first sight, it might seem that an open system of promotion and relegation provides an opportunity for any club to be able to compete for promotion to a higher league. In practice however, according to Pijetlovic, the rich clubs are almost never relegated, since their financial resources ensure that they can acquire sufficient talent to win matches. By contrast, small clubs that play in lower leagues and rely on different sources of financing from the successful clubs are unlikely to ever make it to the high leagues. This effect is further discussed in Chapter 2. In this sense, there are substantial similarities between the ranking within an open league structure and competitive ordinary markets.³⁵

³¹ Ibid.

³² For illustration, let us compare international football and ice hockey competitions. Football regulation is globally unified, clubs are obligated to release players for international competitions, for which special dates are reserved in the schedule so that domestic and international events do not collide. The best players are therefore available to compete both at club and international level, delivering a better product for the supporters and sponsors. In contrast, the regulation of ice hockey is not globally unified. While there is an “almost a pyramid system” in place as well, not all clubs are part of it. Most notably, the North American NHL, where the best players are said to compete, is not a part of the pyramid. As a result, clubs within NHL do not release their players for international competition in case of a schedule collision, which happens frequently. The best players therefore compete at the international level only sometimes, to the detriment of fans and sponsors.

³³ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 38.

³⁴ A notable example is the “Calciopoli” scandal which took place in 2006 in Italy. Several teams, including the champions Juventus, were relegated as a sanction for an uncovered match-fixing scheme. See: Juve hit hardest as cheats are punished. *The Guardian*, 15 July 2006, retrieved on 17 May 2021 from <https://www.theguardian.com/football/2006/jul/15/newsstory.europeanfootball>.

³⁵ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, p. 38.

1.1.3 Convergence of sporting models

As was already outlined above, the sporting models are still only models rather than a precise description of reality of all sports. According to Halgreen, the globalization of world's economies, the revolution in broadcasting and telecommunication industries and the resulting media revenues are factors which bring the two systems closer.³⁶ There are features of the Northern American model which found their place even in football, a sport that is perceived to be fitting the European model rather well.

One of these features is the club licensing system used by UEFA³⁷ for clubs who wish to participate in regional competitions. In addition to the criterion of sporting performance, the eligible clubs must fulfil a series of defined standards. These are based on sporting, infrastructure, personnel, and administrative, legal, and financial standards.³⁸ If a club qualifies for the competition on performance grounds but fails to meet the criteria, it shall not be allowed to participate in the competition. This is a sign of an erosion of the “pure” open system into a semi-closed one, that more resembles the Northern American system.

The point this subchapter presents is not purely academical. There is a traditional reluctance in European football to adopt measures utilized in the Northern American system, which according to some authors has led to competitive imbalances, some aspects of which this thesis explores.³⁹ At some point, the discussion which measures to employ to safeguard competitiveness reaches an argument whether instruments that traditionally do not find their place in the European model could nevertheless provide an accepted solution. Relating to the point of transfer fees, introduction of salary caps, which are essentially limits on wages, a common feature of the Northern American system, is remains a possible solution to clubs leveraging their financial power into a competitive advantage.⁴⁰

³⁶ Halgreen, L. (2004) *European sports law: A comparative analysis of the European and American models of sport*. Copenhagen: Forlaget Thomson/GadJura, p. 42.

³⁷ UEFA is the regional association for Europe. The structure of football governance is presented further in Chapter 1.2.3.

³⁸ UEFA Club Licensing and Financial Fair Play Regulations (2018), Chapter 3.

³⁹ For example, Nafziger in Nafziger, J.A. (2008) A comparison of the European and North American models of sports organization, *The International Sports Law Journal*, 3-4, pp. 100–108, or Camatsos in Camatsos, S. (2005) European sports, the transfer system and competition law: will they ever find a competitive balance? *Sports Law J* 12, pp. 155–180.

⁴⁰ In 2020, the English Football League introduced fixed salary caps for the League One and League Two, which are the third and fourth highest leagues in England and Wales. It was however successfully challenged by the Professional

1.2 Transfer fees within the football regulation

This subchapter chapter presents the role of transfer fees within the transfer system. First, the development of transfer fee is presented in Chapter 1.2.1. The next chapter examines what transfer fees are in Chapter 1.2.2. Following is the overview of the rest of transfer regulation to put transfer fees in context in Chapter 1.2.3, with a special attention paid to redistributive mechanisms in Chapter 1.2.4. Finally, additional regulation that is not directly related to transfers but is presented for overall context in Chapter 1.2.5.

1.2.1 The development of transfer fee regulation

Should football players be treated as ordinary employees who can freely change employers, or is sport special enough to justify an exception? That is the central theme of football transfers. Stakeholders hold different views among them. For the clubs and associations grouping them, the player should not be able to break his contract, otherwise competitive balance would suffer. The players and their unions on the other hand want to retain the right of free movement of players that is enjoyed by regular employees. The transfer fee regulation attempts to find a balance between these interests.

Employment and registration of footballers was traditionally governed by two sets of rules: transfer systems and nationality quotas.⁴¹ The roots lie in the registration system employed in the English Football League in 1893, where the only players who could participate in matches were the ones registered with the league for a particular club.⁴² The clubs in possession of a player's registration started to release it only on payment of compensation from the club that wished to employ them. If the valuation were not met, the current club would retain the registration and the player was not able to change employers.⁴³ The system, characterized by its tendency to safeguard tradition, had to undergo two substantial amendments as a response to EU law concerns.

Footballers Association on grounds of inadequate consultation process. Despite that, a full season with salary caps already took place, providing an opportunity for an analysis of the effects. Bordell, Will "From rags to riches: what next for salary caps in football?". Blackstone Chambers. Retrieved on 18.05.2021 from <https://www.sportslawbulletin.org/from-rags-to-riches-what-next-for-salary-caps-in-football/>.

⁴¹ Garcia-Garcia, B. (2011): The 2001 informal agreement on the international transfer system. *European Sports Law and Policy Bulletin*, 1-2011, pp.17-29, ISSN: 2039-0.

⁴² McArdle, D. (2000) *From boot money to Bosman: Football, society, and the law*. London: Cavendish Pub., p. 19.

⁴³ *Ibid*, p. 20.

The first substantial change is the *Bosman*⁴⁴ case, which was already touched on in the previous parts of this thesis. The judgement had two specific effects on the transfer system.⁴⁵ Firstly, transfer fees for players out of contract were abolished. Players without contracts could therefore be engaged by a new club without the necessity to pay a fee to the old club for the registration. However, transfer fees for players under a contract remained. Additionally, nationality quotas for European players were lifted, allowing for greater player mobility. Before *Bosman*, the 3+2 rule applied for foreign nationals. The rule stipulated that only three foreign players and two additional foreign players who came from the club's academy were allowed in the squad. *Bosman* eliminated these restrictions relating to players from Member states on the grounds that they constituted a breach of the freedom of movement provided⁴⁶ by Article 45 TFEU.⁴⁶

The next substantial change took place in form of the 2001 Agreement on the Transfer System between UEFA and the European Commission. Following *Bosman*, the industry was given the space to re-arrange the system. The clubs reacted by a tendency to tie their players with longer contracts, and transfer fees were still paid at high levels.⁴⁷ The European Commission launched an informal competition procedure to investigate the alterations made to the system. At the same time, the European Commission engaged in discussions with FIFA, which represented the world, UEFA, which represented Europe, and the players' association FIFPro. The discussions sought to decide on how to shape the new system after *Bosman*.

In March 2001, the European Commission finalized the discussions through an exchange of letters between FIFA president Blatter and Commissioner Monti. The resulting agreement was that as long as FIFA followed the agreed principles, it would “pave the way to a positive solution on the competition procedure”.⁴⁸ The investigation was indeed closed in 2002. Out of the agreed principles, those key for the purpose of this thesis are “that in the case of players aged under 23, a system of training compensation should be in place to encourage and reward the training effort of clubs, in particular small clubs”, and “that there should be the creation of solidarity mechanisms that would redistribute a significant proportion of income to clubs involved in the training and

⁴⁴ Case C-415/93 *Bosman*, [1995] EU:C:1995:463.

⁴⁵ For a more detailed analysis of *Bosman*, see for example Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 101 et seq.

⁴⁶ At the time Article 48 of the Treaty Establishing the European Community.

⁴⁷ Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 216-217.

⁴⁸ European Commission (2001) *Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers* (IP/01/314).

education of a player, including amateur clubs”. In addition, transfer windows and suspensions for players who breached their contract in the protected period as a mean to reinforce contract stability were introduced. Pearson observes that while the transfer fee system was at first sight abolished in the new system, in reality the transfer fee amounts rebounded after an initial brief reduction.⁴⁹ This allows for a contemplation on whether anything changed at all.

Some literature suggest that the method of informal exchange of letters does not establish legal certainty,⁵⁰ whereas other argues that the exchange appears as a contract and could qualify as a formal decision ending the dispute.⁵¹ Even if we were to accept the second argument, the power of the European Commission to review the case are not extinguished despite that it might have created a legitimate expectation by entering into the agreement.⁵² In that case, compliance with the agreement ultimately depends on the implementation of the agreed principles. The fact that no competition procedure with regards to football transfers was started since, does not rule out the assumption that the system is not compliant with EU competition law. This is more evident when we consider the political sensitivity of interventions in football transfer system, which is a high-profile area that was relatively easy to capitalize on by political opportunism in the past.⁵³ As such, it would explain the European Commission’s reluctance to initiate any proceedings. The past record of legal battles resulting in a strained relationship supports this argument.⁵⁴ However, almost 20 years passed since the agreement. I believe that however stable the legal foundation might have been then, the system as well the economic circumstances of football transfers have changed to merit a review despite the 2001 Agreement.

⁴⁹ Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football ‘Transfer System’, *European Law Journal*, 21(2), p. 228.

⁵⁰ For example Parrish, R. (2015) Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law. *Maastricht Journal of European and Comparative Law*, 22(2), p. 267.

⁵¹ For example Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 91.

⁵² Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 91.

⁵³ As eloquently put by Weatherill, “[i]t is doubtless appealing to politicians to grab cheap headlines by ‘defending’ football, especially where no financial commitment is involved.” On political influences on the 2001 Agreement, see Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 95.

⁵⁴ Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 95. Even though this specific paper was published in 1999, I submit that this consideration can be applied today, perhaps even more so given the number of cases that emerged in the meantime.

1.2.2 The nature of transfer fees

When it comes to transfer fees themselves, it is interesting that transfer fees are not mentioned anywhere in the applicable regulation. Their nature must therefore be deduced from the whole context. The transfer fee is essentially a price of the player that is comprised of sporting and economic value. The size of the transfer fee is uncertain and subject to negotiations, which consider multiple factors. Two approaches are commonly used in determination of the transfer fee size – the cost-based approach and the talent-based approach.

The cost-based approach is based on the utility value of the player. However, it is recognized that the application of economic analysis is difficult in sport and does not offer clear answers on how to measure such value in concrete terms.⁵⁵

The talent-based approach, on the other hand, relies on quoted value of the player, like an artwork would.⁵⁶ The talent of the player can be estimated from the following factors of sporting and non-sporting nature. The first indicator is the past performance of the player. Second is the age of the player and the stage of their career they are currently in, shows that players before and during their prime are generally more expensive than players who are already past their prime. Next factor is the existing contract of the player and its conditions. Since *Bosman*, a club cannot command a transfer fee for an out of contract player. Therefore, it follows that the less time left there is on a player's contract, the lower is the resulting fee that will be accepted by the selling club. This way, the selling club secures a lower fee as opposed to no fee at all. In addition, some contracts contain a stipulation to the maximum sum payable for the player, a release clause. That in essence provides a ceiling for the transfer fee. The buying club can trigger the release clause unless it can negotiate a lower transfer fee. Another factor is the nationality of the player and his homegrown status, as some competitions restrict squad composition.⁵⁷ Finally, there is a non-sports value of the player which is centered around the marketability of the player.⁵⁸ It allows the employing club to generate

⁵⁵ KEA and CDES, (2013) *The Economic and Legal Aspects of Transfer of Players*, Report for the European Commission, p. 141-142.

⁵⁶ *Ibid.*

⁵⁷ Such as European competitions or Premier League. The UEFA Homegrown rule is presented in more detail in Chapter 1.2.5.

⁵⁸ The study conducted by KEA – CDES for the European Commission observes the player's marketability as a diverging factor between price and value. I disagree with this observation, because I believe that the value of the player comes from all markets, including the exploitation market where a club might benefit from increased merchandise sales, not just the competition market where playing ability is the only relevant factor.

additional revenue by exploiting the player's marketability, which can be quite significant in case of high-profile players. This commonly happens in form of sponsorship deals, merchandise sales, et cetera.⁵⁹

1.2.3 The regulation of transfers

The regulation of transfers in football is set by FIFA. Adhering to the European sports model, FIFA is the global governing body of football. It functions as an umbrella association, governing national associations, who are members of FIFA. A national association groups clubs from roughly the area of a country. Membership in FIFA is conditional on a membership in a confederation, which is a regional association grouping national associations. However, confederations themselves are not members of FIFA. Instead, they are recognized by FIFA, and certain powers are delegated to them by FIFA. A football club is a member of FIFA and based on its location a member of its respective confederation, and its respective national association, and is subjected to the regulatory power exercised by all these bodies. The confederation governing roughly the area of Europe is UEFA, which groups among others the national associations of Member States. Both FIFA and UEFA are private associations governed by Swiss law.

Unlike in the Northern American system, the football transfer rules are not a result of labor negotiations. Instead, there are imposed by FIFA in its regulatory capacity of a global governing body. The regulation of the transfer system that is relevant for the scope of this thesis is provided by the FIFA Regulations on the Status and Transfers of Players,⁶⁰ issued by the FIFA executive committee. The RSTP, introduced as a result of *Bosman*, is essentially a set of rules that govern international transfers, that is transfers between clubs of different national associations. Domestic transfers, which take place between clubs within the same national association, are governed by the rules of that national association. Nevertheless, domestic rules must be in line with the RSTP, so that a minimal standard is maintained. All transfer rules, domestic and international, must therefore be consistent with the RSTP.⁶¹

⁵⁹ For an illustration of the importance of marketability, see the KPMG report breaking down the economics of the transfer of Cristiano Ronaldo from Real Madrid C.F. to Juventus FC. KPMG (2018) From Madrid to Turin: The Ronaldo Economics, available at: [https://www.footballbenchmark.com/documents/files/public/KPMG%20Football%20Benchmark_Ronaldo%20Economics\(1\).pdf](https://www.footballbenchmark.com/documents/files/public/KPMG%20Football%20Benchmark_Ronaldo%20Economics(1).pdf).

⁶⁰ Further referenced to as "RSTP".

⁶¹ RSTP, art. 1.

In addition, transfers in some Member States are influenced by public intervention through their national regulation.⁶² Whereas some Member States established Sports Acts where transfer provisions are contained,⁶³ others govern transfers through acts of a different nature.⁶⁴ In essence, the public intervention is limited in its prescriptive nature and intends to give authority to the sport's governing bodies.

A player transfer is a change of player's employment. In contrast to 'regular' employment practice, the system for employment of football players is quite different.⁶⁵ It is temporary and can be in effect for 5 years at the longest.⁶⁶ A player may only be fielded by a club that holds the player's registration. In case of a transfer, the subject of the transfer is the release of the player's registration. A player can be registered only for one club at a time.⁶⁷ The registration does not expire with the contract, and the player registration must be released in case of a player transfer. As result of *Bosman*,⁶⁸ the release of registrations for players with expired contracts is mandatory.

A contract may be terminated either by mutual agreement, or unilaterally if there is a just cause.⁶⁹ If either party unilaterally terminates a contract without just cause, a compensation is payable, and additional sporting sanctions may be imposed. Both the selling club and the player must therefore have an agreement for a transfer to take place.

There are generally two ways for a player to transfer – either when a player is out of contract, or while a player still is under a contract. A player within the last 6 months of his contract may enter into negotiations and sign a contract with a new club that will be effective once the current contract expires. In the first scenario, no transfer fee is payable, and the old club is obliged to transfer the player's registration to the new club. In the second scenario, where the player is still under a contract that does not expire within 6 months, the selling club is not obliged to sell the player and release the registration. A selling club would therefore sell the player only if it was satisfied by the

⁶² KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission, p. 2.

⁶³ Such as Bulgaria, Greece, Hungary, and Lithuania.

⁶⁴ Such as Belgium, Italy, Portugal, and Spain.

⁶⁵ In most of the EU Member states, the relationship between a player and a club is seen as a relationship between employer and employee. To this point, see Opinion of AG Lenz in Case C-415/93 *Bosman* ECR1995 I-4921, para. 271 et seq. In some Member states, such as in the Czech Republic, football players are considered tradesmen rather than employees. This distinction is not relevant within the scope of this thesis.

⁶⁶ RSTP, art. 18.2. Where RSTP is mentioned, it is referred to the June 2020 edition unless specified otherwise.

⁶⁷ RSTP, art. 5.

⁶⁸ Case C-415/93 *Bosman*, [1995] EU:C:1995:463.

⁶⁹ RSTP, Art. 13 and Art. 14.

offer. A satisfying offer usually includes a transfer fee that is typically higher than the remaining value of the player's contract.

The RSTP provisions which govern transfers and therefore set the scope for transfer fees are Articles 13 to 21. Article 13 outlines the general principle of contract stability, built upon the principle of contract stability. It provides that a contract may only be terminated either by expiry or by mutual agreement. The following articles present further limitations.

According to Article 14, a contract may be unilaterally terminated by either party without consequences where there is a just cause, which can be either 'general', sporting, or for outstanding salaries. 'General' just cause, as opposed to sporting or for outstanding financial payments, is not further explained in Article 14 itself. The Commentary on RSTP provides some clarity, as it explains that application shall be done on a case-by-case basis and that the provision is aimed at contract violations that reach a certain intensity - either if the violation lasts a long time or if more violations accumulate.

Sporting just cause is defined in Article 15 and means participating in fewer than 10% of the matches taking place in a given season. While sporting sanctions will not be imposed if a cause is found to be just, compensation may still be payable. Just cause for outstanding salaries is defined by Article 14bis, which provides the fundamental rule that the player is deemed to have just cause if a club fails to pay at least two salaries on their due dates, unless a collective agreement, if there is one, stipulates differently.

Consequences for terminating a contract without just cause are provided by Article 17. For contracts terminated without just cause, sporting sanctions and compensations are always imposed if the breach happens within a 'protected period', that is first three years of a contract for players under 28 years old and first two years otherwise. Sporting sanction means a four-month ban on playing in official matches, or a six-month ban if there are aggravating circumstances.⁷⁰ Whereas unilateral breach outside the 'protected period' does not result in sporting sanctions, compensations may still be imposed. If a player with an outstanding compensation joins a new club, the new club is jointly and severally liable.⁷¹ The compensation is calculated based on numerous factors and should approach the residual value of the contract that was terminated.⁷² The

⁷⁰ Article 17(3) RSTP.

⁷¹ Article 17(2) RSTP.

⁷² Article 17(1) RSTP.

relevant criterion for this thesis is that ‘the fees and expenses paid or incurred by the former club’ are considered. Consequently, a transfer fee or its part might become a part of the compensation. This effect seems more likely to happen in cases of player induced breach, since a club is harmed by prematurely losing a player for whom a transfer fee had to be paid. To the contrary, in a club induced breach the size of the transfer fee does not directly affect the player.

Due to the vagueness of the criteria and inconsistent application by either the FIFA Dispute Resolution Chamber or CAS, the potential consequences of a breach remain highly uncertain. In practice, contracts are unilaterally terminated on behalf of the club only very rarely, and on behalf of the player even more so. The reason is the uncertain calculation of compensation, that may still be imposed even in cases of termination on the ground of sporting just cause. As such, it in effect prevents the players from making an informed decision about their transfer.⁷³ In addition, the short nature of players’ careers plays its role. Many players would find better option in sitting out the remainder of a contract they wish to terminate rather than pursue the termination itself, which may become a lengthy procedure if a dispute arises. For these reasons, the most frequented routes of transfers are still either upon expiry of a contract or mid-contract for a transfer fee. The players’ reliance on this traditional way of transfers highlights the importance of transfer fees within the transfer system and amplifies any anticompetitive effects of transfer fees.

1.2.4 Training compensation and solidarity mechanism

Based on the view that clubs involved in the training and development of young players should receive financial reward for it, FIFA committed in the 2001 agreement to introduce mechanisms to support the training of players. The two main mechanisms, training compensation and solidarity mechanism, are explained in this subchapter.

Training compensation is a financial amount that is paid to the club that trained the player in question. It is founded on the premise that the training and education of a player takes place between 12 and 23 years of age. This premise may be refuted by evidence to the contrary, in which case it might be concluded that a player terminated his training period even before the age of 21. A training compensation is payable up to the age of 23 for any training that took place in this

⁷³ Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football ‘Transfer System’, *European Law Journal*, 21(2), p. 232.

period up to the age of 21, or lower if training was terminated. The obligation to pay training compensation is triggered when the player registers as a professional or when he is transferred, both during and at the end of his contract. In the first case the compensation is divided to all clubs that participated on the players training, whereas in the latter the compensation is payable only to the club releasing the player.⁷⁴

The amount is determined in the following manner. Based on the quality of training that clubs provide, national associations divide the clubs into four categories. For each category, training costs are set based on the necessary amount to train one player. This number is further multiplied by the ‘player factor’, the ratio of players who need to be trained to produce one professional player. This calculation mechanism reflects that not all trained players will play professionally but the club still incurred the cost of training them. Nevertheless, there are exceptions to the general rule. The obligation to pay compensation does not arise when a player’s contract was terminated without just cause. No compensation is payable when the player transfers to the lowest category, or if the player regains his amateur status, or in other words, the investment into his training has not paid off. Finally, in Europe, no compensation is payable when an unwanted player’s contract runs out, the club does not offer an extension, except in cases when the club can justify why would it be entitled to compensation.⁷⁵

In *Bernard*, the Court held that the system of training compensation can be justified based on the legitimate objective of training and education of young players, as long as it is calculated on actual training costs. However, according to Ongaro, FIFA admitted that it does not know what kind of costs should be taken in account when establishing training compensation fees.⁷⁶ Therefore, the link that training compensation relates to actual cost cannot be established as required by *Bernard*.

Solidarity mechanism aims to redistribute income to clubs who train players and incur costs in doing so. The mechanism results in the ‘trickle down’ effect, as a fixed percentage of any contribution is distributed to the clubs who trained the player at a respective stage of his career, including amateur clubs. The main difference between training compensation and solidarity mechanism is that the solidarity mechanism is dependent on the transfer fee and is only triggered

⁷⁴ Article 20 of and Annex 4 to the RSTP.

⁷⁵ Ibid.

⁷⁶ Ongaro, O. (2010) ‘The system of training compensation according to the FIFA regulations on the status and transfer of players. The Bernard case: sports and training compensation.’ *Eur Sports Law Policy Bull* 1:69–92.

when a player under contract transfers for a fee. Whereas the training compensation is in addition triggered when a player registers as a professional but may only be triggered up to the age of 23, and does not require a transfer fee, since it applies to out-of-contract players as well.

The amount of solidarity contribution is set at 5% of any compensation paid for a transfer, such as a transfer fee, except for training compensation. This amount is then deduced from the total compensation and distributed to the clubs that the player was registered with between his 12th and 23rd birthday. For every calendar year where the player was registered for a club between 12 and 15 years the training club is awarded with 5% out of 5% of the transfer fee and 10% of 5% of the transfer fee from 15 to 23. That results in 0.0025% of the transfer fee for the former category and 0.005% for the latter for each year.⁷⁷

1.2.5 Additional relevant regulation

In addition to transfer fees, there is additional regulation which has a substantial effect on the overall functioning of the transfer system. Namely the Financial Fair Play Regulation, and to a lesser extent the UEFA Homegrown Player Rule. For the evaluation of the context of transfer fees, it is essential to briefly present them as well in order to better understand the role of transfer fees within the whole system.

The Financial Fair Play Regulation was introduced by UEFA in the 2011-2012 season in an effort to promote spending discipline of clubs and to enforce long-term financial stability. The main tool that the regulation employs is the break-even requirement, under which football clubs cannot spend more than they earned in previous seasons over a three-year rolling period.⁷⁸ If a club does not comply, sporting and financial sanctions are imposed.⁷⁹ The regulation has however had an effect of entrenching the high-earning clubs in their positions, making it impossible for any new clubs “buy their way into victory”. In the past, for a mid-level club of the English Premier League, it cost at least £357 million spent on transfer fees and £390 million on wages to win the Premier

⁷⁷ Article 21 of and Annex 5 to the RSTP.

⁷⁸ With some tolerance permissible in special circumstances.

⁷⁹ The practice showed that sporting sanctions are not strictly imposed. There were no sporting sanctions imposed in the following two cases, which received the most attention related to spending limits. For Manchester City, two-year ban from European competitions was overturned by CAS. The investigation of Paris Saint-Germain was closed without any sanctions imposed. Responders in media suggested that UEFA was overly lenient to enforce the regulation since a ban of either club from European competitions would lower the marketability of the competition, resulting in a financial loss for UEFA.

League title. The club in this example happened to be Manchester City following Sheikh Mansour's acquisition of the club in September 2008, who after ending the season at 10th place in 2009 won the Premier League for the first time in 2012.⁸⁰

However, at this time, certain elements of the Financial Fair Play regulation are suspended and replaced by temporary measures.⁸¹ This is a result of the Covid-19 pandemic, which caused the hit to revenues and rendered the break-even rule unenforceable. Consequently, the rules are likely to be revised in the future, as there are reports of a planned overhaul to the Financial Fair Play.⁸² However, the analysis features the Financial Fair Play rules to the extent they were effective before the temporary measures were introduced to show the effect they had on the transfer market since their introduction.

Another important regulation deals with when a transfer may take place over the course of the season. Unlike in a regular employment practice, where an employee may generally change employment at any time, a player may only transfer within two registration periods. Those are commonly referred to as transfer windows and may not exceed a total of 16 weeks per year. The objective pursued by transfer windows is the stability of the competition, so that teams do not change during a specific phase of the competition. The Court found it to be a legitimate one in *Lehtonen*.⁸³ The additional pursued objective is contractual stability, which enables clubs to build and maintain their squads with a higher degree of certainty. The main effect of transfer windows on the players is that it restricts their freedom of movement according to Article 45 TFEU. Nevertheless, transfer windows also have an effect on competition, albeit a supplementary one, in that they are a part of the player transfer system and provide the broader context.

The UEFA Homegrown Player Rule aims to encourage training of local players. In order to do so, the rule mandates that any club participating in UEFA competitions must have at least 8 'homegrown' players in a 25-man squad. Players who are trained in a national association between

⁸⁰ Szymanski, S. (2015) *The Economic arguments supporting a competition law challenge to the transfer system*, p. 10, available at https://www.slideshare.net/Monty_FIFPro/stefan-szymanski-study-abusive-transfer-system-is-failing (accessed 16 June 2021).

⁸¹ Addendum to the UEFA Club Licensing and Financial Fair Play Regulations (Edition 2018), 18 June 2020.

⁸² UEFA set to overhaul Financial Fair Play rules later this year with a luxury tax and salary cap being considered. *Sky Sports*, [online], <https://www.skysports.com/football/news/11095/12380096/uefa-set-to-overhaul-financial-fair-play-rules-later-this-year-with-a-luxury-tax-and-salary-cap-being-considered> [Accessed 19 August 2021].

⁸³ Case C-176/96, *Lehtonen* [2000] EU:C:2000:201, par. 60.

the age of 15 and 21 are considered homegrown, regardless of their nationality. That means that only the best European clubs who qualify for the UEFA competitions must comply with the homegrown rule in order to be allowed to participate. A conflict resurfaces with any proposal between promoting local talent and EU law, particularly when it comes to free movement of workers. The European Commission considered the homegrown player rule as a proportionate mean to attain the objective of promotion and protection of young players.⁸⁴ The proportionality is even more evident in contrast to the alternative at the time, the 6+5 rule proposed by FIFA. According to the 6+5 rule, at the start of each match a club would have to field at least six players who were eligible for the national team of the club. That would mean that the players would have to hold the nationality of the association, in addition to other criteria. The homegrown rule is therefore seen as a less restrictive measure that is still able to achieve the objective.

The homegrown player rule has an impact on transfers in that it further increases the value of homegrown players. Because homegrown players are required to participate in UEFA competitions, where the best teams in the world compete, it follows that the value and the resulting transfer fee and wages for homegrown players would be higher than for a foreign player of otherwise equal attributes. This leads to a potential distortion on the market for the best local players who tend to cumulate in the best clubs in an association, as it is only the top clubs which participate in European competitions and as such must comply with the homegrown player rule.⁸⁵

Lastly, it is worth mentioning the influence of the FIFA Third Party Ownership ban on transfers. According to Article 18ter of RSTP, no third party may participate in a player transfer or in paying compensation. The TPO ban prevents clubs from using this method of financing their transfer activities.

The transfer window rule, Financial Fair Play and the homegrown player rule are not the only rules that interact with the transfer regulation. However, I believe that the effect on transfers of the rules mentioned above is substantial enough. As such, these rules feature in the analysis due to their relevancy for the examination of both the restriction and the justification of the transfer rules.

⁸⁴ Downward P., et. al., (2014) An Assessment of the Compatibility of UEFA's Home Grown Player Rule with Article 45 TFEU, *European Law Review*, vol. 39, no. 4, pp. 493-510.

⁸⁵ With one exception of the English Premier League, which also employs the homegrown player rule.

2 The analysis of transfer fees

In the previous chapter, the nature of transfer fees was presented. In this chapter, the analysis itself is carried out. First, the general competition rule framework of the Treaty on the Functioning of the European Union (TFEU) is presented in Chapter 2.1. Next, the specific application of competition rules in sporting context is presented in Chapter 2.2, which introduces a four-step approach that the analysis follows. As a first step, the relevant market is determined in Chapter 2.3. Then, the nature of transfer rules is explored in Chapter 2.4. Next, the nature of associations and clubs as undertakings is explored in Chapter 2.5. In Chapter 2.6, the restrictions to competition are presented. Finally, possible justifications are assessed in Chapter 2.7. The analysis is structured in a way that for every step of the analysis, the rules concerning the given step are presented first and then directly applied. The analysis is then concluded by discussion in Chapter 2.8, where the results of the analysis are debated, and possible solutions are explored.

2.1 The competition rules framework

This chapter presents the framework of competition rules that are applied to the solution of the hypothesis. Firstly, Article 101 TFEU and Article 102 TFEU are presented in Chapter 2.1.1. Then, the specific application in sporting context is presented in Chapter 2.1.2. Finally, the role of Article 165 TFEU and the concept of conditional autonomy are presented in Chapter 2.1.3.

2.1.1 Articles 101 TFEU and 102 TFEU

The EU competition law provisions are set out in Articles 101-106 of the Treaty. For the purpose of this thesis, Articles 101 TFEU and 102 TFEU are key. This section presents a description of these articles.

The general prohibition is laid out in Article 101 TFEU, and it states in paragraph 1 that: “[t]he following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to

acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” Further, there is a nullity provision in paragraph 2, which states that: “[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void”. Finally, there is an exception to the provisions of paragraph 1 in paragraph 3, stating that: “[t]he provisions of paragraph 1 may, however, be declared inapplicable in the case of: [...] any agreement or category of agreements between undertakings, [...] any decision or category of decisions by associations of undertakings, [...] any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

Article 101 TFEU prohibits cartels through providing a non-exhausting list of agreements including price fixing, market sharing and both horizontal and vertical agreements which restrict or distort competition and affect trade between EU member states. The prohibition applies both to horizontal or vertical agreements when prevention, restriction, or distortion of competition within the common market is either the object or the effect of such agreement. As for the term “agreement”, the definition is broad and all agreements between independent undertakings that might distort competition within the internal market are considered “agreements”. The remaining practice that is not considered to be an “agreement” but amounts to a mental consensus in conduct, or cooperation, is considered a “concerted practice”.

Article 102 TFEU prohibits abuse of dominant position on the internal market. It states that: “[a]ny abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 102 TFEU provides a non-exhaustive list of behavior that would constitute an abuse.⁸⁶ The term “dominant position” refers to a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”⁸⁷ The European Commission generally considers an undertaking to be dominant if it can increase the prices above the competitive level or maintain them there without facing sufficiently effective constraints. Constraints are generally a combination of market power of actual competitors, the credible threat of new competitors entering the market or expansion of actual competitors, and countervailing buyer power of the undertaking’s consumers. Based on the degree of market dominance, a dominant undertaking bears a special responsibility to not abuse their dominance which must be considered on a case-by-case basis.⁸⁸ Nevertheless, it is important to emphasize that the aim is not to prohibit dominance itself, but to prohibit its abuse.

Articles 101 TFEU and 102 TFEU may be applied both separately and simultaneously.⁸⁹ An illustrative situation for simultaneous application is where a dominant undertaking attempts to reinforce their market power with contractual clauses, such as exclusivity. Unless this collusion is tacit, resulting in application of only Article 102, for an explicit collusion of this kind both articles can be applied simultaneously.⁹⁰

2.1.2 Application in sporting context

The practice of sport bodies is subjected to the rules of the Treaty governing free movement law and competition for over 50 years.⁹¹ Over time, the practice evolved into a discipline of its own, EU Sports Law. At its core, it poses a question about how different or special sport really is to deserve a special treatment.⁹² When it comes to applying competition law to sports, we find an established pattern of application that takes the specificity of sport into account. This section

⁸⁶ Lorenz, M. (2013) *An Introduction to EU Competition Law*. Cambridge [UK]: Cambridge University Press, p. 31.

⁸⁷ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, par. 38.

⁸⁸ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, par. 10 et seq.

⁸⁹ Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, par. 116.

⁹⁰ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, p. 167

⁹¹ Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., p. 527.

⁹² *Ibid*, p. 552.

presents the framework of subjecting sporting rules to the competition law provisions of the Treaty and serves as a basis for the analysis of transfer fees itself.

The practice developed to show which sporting rules may be subjected to EU competition law. It is already established that sport is subject to EU law “in so far as it constitutes an economic activity”. The rules related to sports that may have anti-competitive effects are further divided into commercial rules and regulatory rules. Commercial rules are rules regulating commercial activity which are not connected to the specific nature of sport. Regulatory rules, on the other hand, govern the way a sport is organized. While they primarily pursue sporting objectives, they often have commercial impacts. Excluding certain rules of the game⁹³ and a purely amateur pursuit, it is hard to imagine a rule completely without an economic effect in practice.⁹⁴

The commercial rules are to be assessed “only” under the standard anti-competitive provisions. In *Piau*, the Court of First Instance explored the nature of FIFA’s rules on football players’ agents. It found that their activity, which mainly consists of acting as an intermediary for the players they represent in contract and endorsement negotiations, constitutes an economic activity which is only ancillary to sport and does not fall within the specific nature of sports, and thus does not merit a sporting exception. As such, special treatment based on specificity of sport is unwarranted, and the same applies to the rules of FIFA governing them.⁹⁵

On the contrary to commercial rules, regulatory rules may be justified based on concerns which are peculiar to sports. Since sport is a specific phenomenon, the practice needed to develop a method of application reflective of that. From a competition point of view, one such special feature of football is the competitive structure. Unlike in a regular market where the competitors seek an increase in market share on account of other competitors, in sports the competitors are mutually dependent. It takes two teams to conduct a football match, and one cannot be without the other. Likewise, there is a need to maintain a competitive balance, which leads to uncertainty of outcome, a key element of sport. In many sports, including football, this is maintained by financial

⁹³ Such as size of the field, how many points are awarded for a successful shot, and gameball size and inflation pressure. Forster coined the term *lex ludica* for formal rules of the game and equitable principles of sport in Foster, K. *Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport’s Jurisprudence*. *ASSER International Sports Law Series*, 2012, pp. 123–148.

⁹⁴ Pijetlovic, K. In: Duval, A., and van Rompuy, B. (2016) *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport*. T.M.C. Asser Press, p. 118.

⁹⁵ Case T-193/02 *Laurent Piau v. Commission* [2005] EU:T:2005:22, paras. 73-75.

solidarity.⁹⁶ This makes the competitors interdependent, at least on some markets. Furthermore, sport has what Pijetlovic describes as transient nature, meaning that there is a necessity for a timely use of resources, since events take place live, and careers of sportspeople are shorter than in other industries.⁹⁷ It therefore follows that sport should be treated differently than other industries.⁹⁸

So how exactly may regulatory rules be justified based on the sporting exception? The applicable framework comes from *Meca-Medina*,⁹⁹ where the Court applied the principles from the *Wouters* case to the specific field of sport. In *Meca-Medina*, two professional swimmers were found to have breached the anti-doping rules adopted by the International Olympic Committee and were banned from entering the competition because of the breach. The Court found that even though the anti-doping rules were sporting in nature in that they pursued a sporting objective, which in this case was the fair play and ethics of the competition, the rules still produced an economic effect, since the swimmers could not compete for any prize money for a period of four years.¹⁰⁰ Therefore, it applied an inherency test from *Wouters*, a case which has nothing to do with sport.

In *Wouters*, the Court considered compatibility of a Dutch rule prohibiting the creation of multi-disciplinary partnerships between barristers and accountants with Article 81 EC (now Article 101 TFEU).¹⁰¹ The court found that the rule restricted competition, but proceeded take account of its overall context, objectives, and effects. Here the court found that the objective was to guarantee the independence and loyalty to the client, which were supposed to secure sound administration of justice. While the rule had an effect of restricting competition, it did not go beyond what was necessary to achieve these goals. It was therefore proportionate in pursuing a legitimate objective, and as such it did not breach Article 81.¹⁰²

⁹⁶ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press. p. 35.

⁹⁷ Ibid.

⁹⁸ For more on specificity of sport, see for example: Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 203 et seq.

⁹⁹ Case C-519/04 P *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492.

¹⁰⁰ Careers of sportspeople are generally short. Peaking age is different among sports, for example female gymnasts are considered to generally peak at the age of 16, while male footballers are considered to peak between 27-29. The window of opportunity for sportspeople to exploit their craft and make return on their investments is therefore very limited, and every ban affects this window more profoundly than might seem at first sight.

¹⁰¹ 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] EU:C:2002:98.

¹⁰² Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., pp. 410-411.

The resulting famous formula¹⁰³ from *Wouters* absorbed to *Meca-Medina* to application of Article 101(1) TFEU to sport cases is that: “account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives”; and that it “has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives [...] and are proportionate to them”.¹⁰⁴ The effect for sport is summarized by Weatherill: “[f]or sport that means to open up the legal assessment of sporting practices that have the effect of restricting competition also to include appraisal of their sporting objective.”¹⁰⁵ Therefore, while there is no universal exception for sport from applying competition rules, sporting rules may nevertheless be justified if they proportionally pursue legitimate objectives.

Some suggest that the recourse to the *Wouters* test for justification is not necessary, as an analogous application of the framework governing research and development would suffice, and in fact predates *Wouters*. The core concept of this argument is following. In research and development agreements (for those of which the results are exploited jointly), resources are pooled together to license their technologies through a single point of sale, and that results in efficiency enhancing features. Or in other words, creates more value for everybody. Ibáñez Colomo argues that football shares this characteristic, since participating teams contribute with their inputs to the delivery of a common product, the league or championship. Further similarities could be found in the tendency to monopolization, in the sense that value of the product is proportional to the amount of its users. Take operating systems for example, where the more people use it, the more convenient and therefore valuable it is, because conversion of the output is not an issue, unlike when multiple system are used. That would in part explain why there is generally one competition system for a particular sport, and why attempts to create competing leagues have so far failed.¹⁰⁶ Ibáñez Colomo therefore concludes that a departure from standard competition analysis to a sporting exception is not necessary in order to find whether rules governing sporting activities are restrictive of

¹⁰³ In circles of sports law enthusiasts at the very least.

¹⁰⁴ Case C-519/04 P *Meca-Medina and Majcen v. Commission*, [2006] EU:C:2006:492, par. 42.

¹⁰⁵ Weatherill, S. In: Anderson, J., et al., (2017) *Research Handbook on EU Sports Law and Policy*. UK: Elgar, p. 15.

¹⁰⁶ Such as in American basketball competition, which saw two major associations operating simultaneously between the years 1967-1976. The multi-competition system was short-lived. The two associations later merged after anti-trust issues were settled. Similar story took place in American football, where the dominant NFL faced three rival leagues between the years 1930-1940. However, only the NFL survived to become the most popular sports league in North America.

competition.¹⁰⁷ While I agree with this rationale, I submit that it does not factor in the fact that there are multiple markets in the organization with sports. While this analysis applies well to the exploitation market in football, and collective sales of broadcasting rights do have benefits for everyone involved, it might not apply so well on the contest market and the supply market for players.¹⁰⁸ Particularly when it comes to buying and selling players, the product, which is the player in question, is not distributed evenly between all competitors, but only to one of them to the potential detriment of other competitors. The transfer rules therefore are a good example of rules where a standard competition analysis would not suffice, and a sporting exemption approach is in my opinion necessary.

In the *White Paper on Sport*¹⁰⁹ and the accompanying *Staff Working Document*¹¹⁰, the European Commission followed the approach from *Meca-Medina* in assessment whether a rule adopted by a sports association relating to the organization of sports infringes the competition law provisions set in Articles 101 and 102 TFEU.¹¹¹ This approach, already outlined at the outset of this chapter, is further presented next.

2.1.3 The impact of Article 165 TFEU and conditional autonomy

Sporting rules were for a long time a product of the autonomy that sporting bodies enjoyed, without much interference from EU law. That changed when the Court declared in *Walrave and Koch*, the first ruling on sport, that sports falls within the scope of the Treaty in so far as it constitutes an economic activity, despite the fact that the Treaty did not mention sport at all.¹¹² Over the following years, the EU though the Court and the European Commission became more involved in applying EU law to sports, in a manner that sporting bodies perhaps describe as interventionist. One example to speak for the rest is, again, *Bosman*,¹¹³ in which the Court forced football governing bodies to substantially adjust the rules regulating transfers of players. Since it was clear that the case to keep

¹⁰⁷ Ibáñez Colomo, P. Rules of Purely Sporting Interest and EU Competition Law: Why the Wouters Exception is Not Necessary, *Competition Law International*, vol. 8, no. 1, Jan. 2012, pp. 54–58.

¹⁰⁸ The specific markets in football are further discussed in Chapter 2.2.

¹⁰⁹ European Commission, “*White Paper on Sport*” (White Paper) COM (2007) 391 final, 11 July 2007.

¹¹⁰ European Commission, “*The EU and Sport: Background and context. Accompanying document to the White Paper on Sport*” (Commission staff working document) COM (2007) 395, 11 July 2007.

¹¹¹ *Ibid.*, Annex 1, ch. 2.1.2.

¹¹² Case 36-74, *Walrave and Koch*, EU:C:1974:140.

¹¹³ Case C-415/93, *Bosman*, [1995] EU:C:1995:463.

EU law out of sports that many sporting organizations made was lost, a change to a more rational approach was needed.

Sporting bodies, such as IOC and UEFA, chose to engage with the EU, both directly and indirectly, with the goal of mitigating the intrusive effects. The intensive lobbying strategy paid off and many political leaders were persuaded to back the sporting movement to gain Treaty recognition at Amsterdam, Nice, and the Convention on the Future of Europe.¹¹⁴ Through series of negotiations, the Article 165 TFEU was introduced by the Lisbon Treaty, cementing the EU authority on a constitutional level, albeit as a supporting competence, the weakest type available.¹¹⁵ That means the ‘hard’ regulatory instruments harmonization and regulation are not available, but ‘soft’ incentive measures and recommendations may be adopted.

Article 165 TFEU provides in paragraph 1 that: “[t]he Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity”. It is further provided in paragraph 1 that: “The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.”

Paragraph 2 provides eight objectives of EU action, with the last one being the significant objective for the purpose of this thesis. This objective is provided to be: “developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.” While the notions of fairness, openness, cooperation, and protection of integrity are nothing new, they arguably became more significant through their inclusion in the Treaty. Fairness and openness are key objectives that football governance strives for, as will be described further in this thesis.

Sporting bodies, with their hopes of complete autonomy and reliance on sporting exemption both quashed, turned from *ex ante* reliance to creating a quality internal system which would survive

¹¹⁴ Weatherill, for example in Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press, 2014, pp. 557-560.

¹¹⁵ *Ibid.*, p. 569.

potential future challenges, often consulting the European Commission first.¹¹⁶ The basis of this system is good governance. That is also an important factor of EU sports policy, the political and ideological goals of EU institutions.

Conditional autonomy is an established concept in sport. It encompasses that the self-regulating bodies of sport enjoy autonomy, but only when the restrictions do not go beyond what is necessary to ensure the proper conduct of sport.¹¹⁷ EU institutions embraced the idea and adopted several decisions which explicitly mention good governance in sport. Such as the 2011 European Council communication on Developing the European Dimension in Sport states that “*good governance in sport is a condition for the autonomy and selfregulation of sports organisations.*”¹¹⁸ The following EU Work Plans on sport all follow suit, stressing good governance as a key topic.¹¹⁹ Good governance, aside from being a necessary requirement to the autonomy of private bodies who do not derive power from any public laws, such as FIFA or UEFA, it could also be a precursor for being allowed to use a public interest defense when justifying their decisions.¹²⁰

Good governance also proved to be in some cases a better substitute for justifiable restrictions, since it eliminates the need for restrictions in the first place. In *ENIC/UEFA*,¹²¹ UEFA prevented ENIC, an investment group, to expand their business into multiple ownership of clubs. The European Commission decision in this case applied the *Wouters* test to affirm the stance of UEFA, which claimed that prohibition of multiple club ownership is essential to maintain a credible competition, as matches played by clubs with the same owner would be tainted by questioning the uncertainty of the outcome. Fifteen years later however, UEFA allowed both Austrian RB Salzburg and German RB Leipzig, who are both owned by the company Red Bull, to take part in the Champions League. In this case, UEFA was satisfied by the governance structures that were supposed to secure independence and prevent the possibility of owner interference to their

¹¹⁶ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, 2015, p. 11.

¹¹⁷ The term *conditional autonomy* is used by Weatherill, for example in Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press, p. 558. Other scholars use different terms, such as Foster using the term “supervised autonomy”, for example in Foster, K. In: Caiger A., Gardiner S., *Professional Sport in the European Union: Regulation and Re-Regulation*, T.M.C. Asser, 2000, p. 64.

¹¹⁸ European Commission (2011) “*Developing the European dimension in sport*” COM 12 final, sec. 4.1. This communication is essentially a follow up to the White Paper on Sport.

¹¹⁹ There were four Work Plans on Sport so far, first one for the years 2011-2014, second one for 2014-2017, third one for 2017-2020, and the last one 2021-2024.

¹²⁰ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 153.

¹²¹ European Commission decision in Case COMP/37 806 *ENIC/UEFA* [2002].

matches.¹²² Therefore, a good governance system made it possible to pursue the objective of credible competition without the need to resort to a restriction, albeit a justifiable one.

Since the sport environment does not favor direct litigation, the European Commission is an important actor in bringing competition issues to the Court. It is submitted that good governance systems will play an increasingly important role in the effort of sporting bodies to safeguard what is left of their autonomy, since the European Commission is likely to be receptive to justification claims on governance grounds.

2.2 Determination of the relevant market

To figure out if any anti-competitive behavior is taking place, it is necessary to determine the market at which the competition takes place. The relevant market generally consists of two main parts, the geographic market, and the product market.¹²³

2.2.1 The geographic market

The geographic market is determined by the analysis of the area where undertakings are involved in the supply and demand of products or services. In this area, the conditions of competition are sufficiently homogenous. If the conditions differ significantly enough, it shows that the area is not part of the geographic market, but rather a neighboring area.¹²⁴

Contrary to former practice that limited the geographic market to the territory of the internal market and the European Economic Area,¹²⁵ recent case law suggests that this limitation is no longer necessary. In *Intel*, the Court noted that the jurisdiction of the European Commission over conduct outside of the EU may be established on the basis of either the implementation test or the qualified effects test.¹²⁶ The implementation test states that regardless of the place where the agreement was

¹²² A situation which was immediately put to test when both clubs were drawn to the same group in the group stage. More at: Red Bull Salzburg vs RB Leipzig: Why Celtic's Europa League fate may rest on controversial result *Goal.com*. [online] Available at: <https://www.goal.com/en-ie/news/red-bull-salzburg-vs-rb-leipzig-why-celtics-europa-league/lj6mn1dg2uilx1662gp5r2u7cq> [Accessed 7 March 2021].

¹²³ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, par. 7 et seq.

¹²⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, par. 8.

¹²⁵ In case IV/36.888—1998 *Football World Cup* [2000] OJ 2000 L 5/55, par. 77, the relevant geographic market was comprised of “at least all countries within the EEA”.

¹²⁶ Case C-413/14 P *Intel Corp v Commission* [2017] EU:C:2017:632, par. 40.

concluded, EU competition law is applicable based on the place where the agreement is carried out.¹²⁷ The qualified effects test allows the application of EU competition provisions based on a justification under public international law when it is foreseeable that the agreement will have an immediate and substantial effect in the EU. In sporting context, this rationale was applied in *ISU v Commission*, where the relevant market was determined as the worldwide market for the organization and commercial exploitation of speed skating,¹²⁸ as opposed to just the geographical part corresponding with the internal market. The geographic market therefore does not necessarily need to be limited to the territory of Member States.

The geographic market for an analysis of transfer fees is the worldwide market for where transfer rules are applied. The football transfer market is geographically interconnected as the rules that are the subject of this analysis, which provide the minimal standard, apply in all territories where associations on all levels carry out a regulatory function. Following the rationale of the qualified effects test, the geographic market can be broader than the territory of Member States, as long as the agreement has immediate and substantial effect therein. Given that the territory of UEFA includes all Member States and that UEFA accounts for half of the total transfers taking place. Additionally, only 5.3% of the total value of transfer fees did not involve a UEFA affiliated club. Clearly, the transfer system has immediate and substantial effects in the territory of Member States.

2.2.2 The product market

The second part, product market, is determined by the analysis of cross-elasticity of demand. The result shows to what extent are the goods or services interchangeable or substitutable from the point of view of the consumer. The extent is based on a hypothetical SSNIP test, which explores whether the consumers of the products or services being considered would switch to readily available substitutes or suppliers in response to a small but significant non-transitory increase in price¹²⁹ (5-10 %). In the test, additional substitutes and areas are included until the increase in relative prices becomes profitable. The definition from the supply side measures cross-elasticity according to the possibility for suppliers to switch to the production or service of the relevant

¹²⁷ Ibid, par. 44, see also Case C-89/85, *Ahlström Osakeyhtiö* [1988] EU:C:1988:258, par. 16.

¹²⁸ Case T-93/18, *International Skating Union v Commission* [2020] EU:T:2020:610, par. 29. An appeal was submitted at the time of completion of this thesis.

¹²⁹ Hence the abbreviation SSNIP.

product without incurring significant additional costs. Therefore, it is beneficial for undertakings to include as many other suppliers and products as possible.¹³⁰

According to Egger and Stix-Hackl, there are three relevant interconnected product markets. The first is the exploitation market, where performances of clubs and national and international associations are exploited, for example in form of gate receipts or broadcasting rights for matches. In this market, the participating clubs do not have directly opposing interests. This can be well observed for example in case of joint selling of broadcasting rights, which proved to be more beneficial for all clubs involved.¹³¹

Upstream of that is the contest market, where the exploited performances in form of sporting contest are being produced, jointly by the competing teams. Here, the players form the essential production factor, albeit not an only one. The clubs here do have directly opposing interests, that is to perform well to the detriment of the opponent. While these are two separate markets, they in practice coincide, in particular when the matches are either transmitted live or consumed at the venue.¹³²

Further upstream, we find the third market, the supply market. It is where players on the supply side are bought, sold, or otherwise engaged by clubs on the demand side. Just as in the contest market, the clubs' interests are directly opposed, that is in engaging the best players available. The demand is generally not restricted as players are found to be exchangeable, following the practice that clubs who fail in engaging their target player frequently engage a different one instead.¹³³

Nevertheless, the supply market, being the players, is not quite homogenous. Based on the players' ability, it is obvious that the top-level players are more unique and therefore much less exchangeable than mid-level players, because there are many more mid-level players and a chance of finding an appropriate replacement is therefore greater. This is even more true for low-level players. Based on this consideration, the market can be further divided into three additional markets.

¹³⁰ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 158.

¹³¹ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 87.

¹³² Ibid.

¹³³ Ibid.

The higher primary market is where few top-level players with high market power face limited number of clubs. This market has a monopolistic structure. Here is where the highest transfer fees and wages occur. The market power of elite players results in their stronger negotiating position, which leads to ability to negotiate better wages. I observe this to be a mitigating factor to the size of the transfer fees, since the player does not benefit from a transfer fee spent on him at all, but instead forces the buying club to allocate more resources to his wages on account of the transfer fee. Likewise, it is in players interest to negotiate a lower buyout clause acting as a transfer fee cap so that he maximizes his chance to enter negotiations with other interested clubs in the future with whom they can negotiate higher wages. Due to the high financial cost of recruiting the top-level players, which consists of salary and a transfer fee for a player under contract, the top-level players may effectively only be engaged by a handful of clubs.¹³⁴

On the lower primary market, we find upper-mid level players who face a great number of clubs. Here, the number of players is larger than in the higher primary market, but it is not a substantial part of all the markets for players. This market has an oligopolistic structure.

On the secondary market, the remaining players who are neither superstars nor upper-mid level players face a limited number of clubs. While there is a great total number of football clubs who could in theory recruit the substantial number of the remaining players, this is in practice limited by scouting and mobility issues.¹³⁵ This market has an oligopsony structure, so it is the clubs who hold the market power.¹³⁶

In conclusion, the relevant market for the analysis is the worldwide supply market, where players are engaged by the clubs. It is especially worthy to observe the higher primary market more carefully since it is the elite players whose engagement is a necessary piece for a success in competition, and all effects of transfer fees are intensified.

¹³⁴ For example, Kylian Mbappé, one of the top-level players mentioned, commands a yearly salary of over €27 million according to Forbes. In addition, Paris Saint-Germain, the club which Mbappé plays for, has reportedly asked for a €200m transfer fee, after having paid €180 million in 2017 to purchase the player from AC Monaco. It is estimated that only 4 clubs in the world can presently afford to sign the player.

¹³⁵ For example, German low-level clubs are more likely to develop their scouting networks in order to discover players in German and possibly a few neighboring leagues rather than in Cyprus. Likewise, a low-level player is less likely to relocate significantly since the wage he could realistically secure is less likely to persuade the player to relocate. Therefore, the number of clubs on the secondary market are limited.

¹³⁶ KEA and CDES, (2018) An update on change drivers and economic and legal implications of transfers of players. Final Report to the DG Education, Youth, Culture and Sport of the European Commission (2018)., pp. 4-5.

2.3 The nature of associations and clubs as undertakings

This subchapter explores the nature of associations (Chapter 2.3.1) and clubs (Chapter 2.3.2) to find out if they are undertakings within the meaning of Article 101 TFEU.

According to the Court, an undertaking is every entity engaged in an economic activity regardless of its legal status and the way it is financed.¹³⁷ In this sense, economic activity means any activity consisting of offering goods or services on the market.¹³⁸

While Article 101 TFEU applies to different forms of collusion between at least two undertakings, including those made through the medium of association, Article 102 TFEU does not use the concept of association of undertakings. Instead, it considers the activities of the members to what would have been an association under Article 101 TFEU as an undertaking.¹³⁹

Since the concept of an undertaking covers every entity engaged in an economic activity, regardless of the legal status and the way in which it is financed,¹⁴⁰ it is necessary to first look for an economic activity. Moreover, the relevant activity is the one that is actually embarked on, rather than activities which are declared as aims. The organizational form of the entity is not significant either.¹⁴¹ In the sport sector, economic activity usually takes place at various levels, including individual athletes, sport clubs, and sport associations.¹⁴²

When it comes to individual athletes, the dividing line seems to rest on the independence of the athlete in question. In *Deliège*, the Court found that a judoka participating in an international competition, who was not remunerated by the organizer, was regardless exercising an economic activity, and therefore was an undertaking. The economic activity in her participation consisted of increased exposure and publicity beneficial for her career since she could attract sponsors and audience through public attendance or a broadcast.¹⁴³ Furthermore, an amateur status does not necessarily remove an athlete from the scope of economic activities.¹⁴⁴ On the other hand, athletes

¹³⁷ Case 41/90 *Klaus Höfner and Fritz Elser v Macroton GmbH* ECR 1991 I-1979, para. 21.

¹³⁸ Case 118/85 *Commission v Italy* ECR 1987 2599, para. 7.

¹³⁹ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press. p. 248.

¹⁴⁰ Case 41/90 *Klaus Höfner and Fritz Elser v Macroton GmbH* ECR 1991 I-1979], para. 21.

¹⁴¹ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 84.

¹⁴² European Commission, “*The EU and Sport: Background and context. Accompanying document to the White Paper on Sport*” (Commission staff working document) COM (2007) 395, 11 July 2007.

¹⁴³ Joined cases C-51/96 and C-191/97 *Deliège* [2000] EU:C:2000:199, paras. 56-57.

¹⁴⁴ *Ibid*, par. 46

who are team players are less likely to constitute an undertaking, as Advocate General Lenz considered in his opinion to *Bosman* in relation to football players, whom he classifies as workers rather than providers of service.¹⁴⁵

2.3.1 Associations as undertakings

National associations are grouping of sport clubs on a national level.¹⁴⁶ They too are undertakings to the extent that they carry out an economic activity, usually consisting of exploiting sport events, such as selling of broadcasting rights.¹⁴⁷ They may also be associations of undertakings to the extent of constituting groupings of clubs or athletes, for whom themselves is sport an economic activity.¹⁴⁸ The fact that associations gather also amateur clubs rather than only professional clubs does not matter in qualifying it as associations of undertakings. For the purposes of Article 102 which does not include the concept of “associations of undertakings”, the association is considered an undertaking to the extent that it is an emanation of its members, who are active on the market.¹⁴⁹

International associations have national associations as their members. Likewise, they are an undertaking to the extent of their own commercial activity, may be an association of undertakings or an undertaking under Article 102 to the extent of their members being undertakings. Sometimes, they may also be referred to as “association of associations of undertakings”.¹⁵⁰

It comes to assessing whether FIFA or UEFA are undertakings, the fact that both FIFA and UEFA are private non-profit associations does not matter since legal status is irrelevant in assessing whether the entity in question is an undertaking or not.

As for FIFA, the economic activity can be derived from multiple channels. According to FIFA itself, the most significant income channels are the sale of television broadcasting rights, marketing rights, hospitality and accommodation rights, and licensing rights related to the FIFA World Cup, as well as other revenue such as from sale of film and video game rights.¹⁵¹ In addition, FIFA

¹⁴⁵ Opinion of AG Lenz in Case C-415/93 *Bosman* ECR 1995 I-4921, para. 263.

¹⁴⁶ With certain exceptions, such as AS Monaco, a Monegasque club which is a part of the French association.

¹⁴⁷ European Commission decision (1992) in Cases 33384 and 33378 *Distribution of package tours during the 1990 World Cup*, OJ 1992 L326/31, paras. 52 and 53.

¹⁴⁸ Case T-193/02 *Laurent Piau v. Commission* [2005] EU:T:2005:22, par. 69.

¹⁴⁹ *Ibid*, par. 171.

¹⁵⁰ European Commission (2007) “*The EU and Sport: Background and context. Accompanying document to the White Paper on Sport*” (Commission staff working document) COM 395, 11 July 2007. sec. 2.1.3.

¹⁵¹ FIFA, Overview of FIFA’s finances. Available at: <https://www.fifa.com/what-we-do/governance/finances/> [Accessed 29 May 2021].

collects a membership subscription, the amount of which is however quite negligible compared to other sources,¹⁵² and financial payments called levies, which amount to 2% of the gross receipts of any international match.¹⁵³ This revenue is then used for organizing competitions and other events, as well as a source for investment into various programs aimed at football development and education, investments in football governance and general governance and administration.¹⁵⁴

The economic activity of UEFA is quite matching to that of FIFA, with a few minor differences. Substantial part is generated by ticket sales, television and advertising revenues, as well as exploitation of rights, such as licensing rights relating to the continental competition that UEFA hosts.¹⁵⁵ FIFA enables confederations, and therefore UEFA, the right to collect levies on international matches.¹⁵⁶ In addition to that, UEFA collects a part of the 2% FIFA imposed levy mentioned above, provided that at least one participant belongs to UEFA, or the match takes place on the territory of UEFA.¹⁵⁷ Other revenues are generated through annual contribution of each member association and competition entry fees.¹⁵⁸

It is obvious that both FIFA and UEFA do carry out economic activity. The magnitude of this market activity is such that it almost entirely overshadows the traditional methods of financing, such as membership contributions. While this activity is not directly linked to the supply market where transfers take place, the supply market itself is clearly linked clearly enough to the exploitation market where the substantial part of economic activity of FIFA and UEFA takes place. In addition, the transfer rules are created and enforced by FIFA.¹⁵⁹ The conclusion therefore is that both FIFA and UEFA constitute an undertaking, associations of undertakings or groupings of associations of undertakings within the meaning of Article 101 TFEU.

¹⁵² The annual subscription is set equally for each of the 211 associations up to \$1000 USD as stipulated by art. 63 of FIFA Statutes. In contrast, the average revenue for the fiscal period 2015-2018 was over \$1.6 billion USD.

¹⁵³ FIFA Statutes art. 64, and FIFA Regulations Governing International Matches art. 13.1.c respectively.

¹⁵⁴ For the 2015-2018 cycle, 81 % of the revenue was redistributed in this fashion, with the remaining 19 % used for administrative expenses.

¹⁵⁵ These are either national level or club level competitions. The latter are presented further in this chapter.

¹⁵⁶ FIFA Statutes art. 66.

¹⁵⁷ FIFA Regulations Governing International Matches art. 13.1.c.

¹⁵⁸ Like with FIFA, the portion of these revenues is rather negligible.

¹⁵⁹ Prior to *Bosman*, it was UEFA who created and enforced the transfer rules for international transfers within Europe. FIFA then retracted the power of confederations to make their own transfer rules in order to create and enforce transfer rules, and presently maintains it.

2.3.2 Clubs as undertakings

Sport clubs are undoubtedly an undertaking within the meaning of Article 101 TFEU to the extent they carry out economic activities. Their economic activity consists of supplying sporting events which are available against payment, such as against broadcasting rights or admission fees.¹⁶⁰ Moreover, clubs recruit players, who are remunerated, compete for prize money, sell merchandise, and otherwise exploit their brand for economic profit.

As for clubs, it is worthwhile to examine their activities predominantly for the purpose of Article 102 TFEU in consideration whether an association can be an emanation of clubs. The clubs' governance has come long way since the early days of amateur clubs, with most clubs turning into professional clubs. I believe that we currently witness a further change to their nature, where clubs increasing favor commercial results as a regular, non-sporting undertaking would. Their status as an undertaking can be deduced from their financial resources, as they increasingly finance themselves from their market activities as opposed to member subscriptions and other traditional methods.¹⁶¹ Professional clubs can be for the purpose of this thesis categorized by two criteria. The first and more important criterion is the financial status. The second and supplementary criterion is the financing model and the corresponding tendency to favor either commercial or sporting success. Both influence the clubs' interest and behavior on the market.

The clubs' financial status in large determines its success in attracting players, as wealthy clubs can pay larger transfer fees, wages, provide better facilities and commercial exposure through association with the club brand.

Based on their financing source, clubs can be categorized in the following fashion.

Some clubs employ public capital through their listing on a stock exchange.¹⁶² Clubs that fall within this category should theoretically aim to be profitable in order to provide shareholders with a return on their investment. This is generally realized either by paying out a dividend or by increasing of value of the stock. Not all publicly listed companies pay out a dividend and the same

¹⁶⁰ European Commission decision in Case COMP/37 806 *ENIC/UEFA* [2002], par. 25.

¹⁶¹ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 84.

¹⁶² At the time of completion of this thesis it is 27 clubs. Notable examples include Manchester United or Ajax Amsterdam.

holds true for publicly listed football clubs, although some of them do.¹⁶³ Nevertheless, the fact that a club has chosen to be publicly listed means that theoretically, it will aim to pay out a dividend at some point in the future. Publicly listed companies can therefore be associated with a steady cash outflow, albeit for some only theoretically. In addition, public corporate structure influences the responsibilities, whose main commitment is to maximize the return to the owners. This may from time to time diverge from the traditional commitment of sport clubs to promote the sport and its culture. On the other hand, public listing enforces good governance principles as well as increased transparency since publicly listed entities must meet a high reporting standard. As the number of publicly listed clubs is still limited, it is hard to estimate the effects of public listing on competition.

In contrast, privately owned clubs may be more financially lenient based on the strategy that they employ. These clubs may or may not prefer profitability over competitiveness, based on the extent to which they are seen as a trophy asset by their owners. Among this category, there was an observable trend of acquisition by wealthy owners who sought to maximize competitive success on account of economic profitability,¹⁶⁴ also labeled as the benefactor model. However, due to the break-even rule introduced by the UEFA Financial Fair Play Regulations, based on which clubs cannot spend more than they earn over a 3-year period, the approach of lavish spending in order to boost on pitch performance was thwarted. The potential and activities of privately owned clubs will be largely determined by the Financial Fair Play overhaul and the restrictions it will present. As of now, privately owned clubs can be associated with either a cash inflow or outflow, steady or irregular, depending on how they are managed.

The third category are the fan-owned clubs, either fully or partially.¹⁶⁵ Members generally provide membership fees to the club, and elect members to run the club on a day-to-day basis. Membership fees provide the clubs with a steady cash inflow.

The ownership structures are not as strictly separated as it might seem, so there is some overlap present. For instance, Manchester United, a publicly listed club, is controlled by persons acting in concert, and yet some shares are likely to be owned by the fans as well. As such, it displays

¹⁶³ For example Manchester United.

¹⁶⁴ Notable examples include Manchester City or Paris Saint-Germain.

¹⁶⁵ Notable examples include Real Madrid and FC Barcelona. In German Bundesliga and 2. Bundesliga, the top and the second top tier leagues respectively, external investors are prohibited from controlling a majority interest so that members retain their control of the club.

characteristics of all the categories. The distinction made above therefore does not work well for clearly separating clubs based on their financing models. Rather, it is a useful demonstration of the way commercial governance approach replaces traditional sporting governance, and some of the effects of this transition.

The above listed categorization of football clubs provides a basis for the analysis of effects of transfer fees on clubs. Because of the differences in their financing and the magnitude of their wealth, clubs do not compete on the same level. It follows that all things equal, there is an inherent degree of competitive imbalance present in the organization of football. In addition, clubs oriented towards making a profit conflict with the traditional sporting structures.

For the purpose of this section, it suffices to conclude that professional football clubs are indeed undertakings, as they carry out an economic activity. They do so by employing and training, among other staff, the players. This activity is economic as well since it is done with the aim to improve sporting success as well as economic success arising therefrom or transferring the players for a fee as a form of occupation training.¹⁶⁶

Likewise, FIFA, UEFA, and national associations are all associations of undertakings within the meaning of Article 101 TFEU with respect to the transfer rules, regardless of whether the clubs that form them are classified as professional or amateur, as long as at least some are professional. This conclusion is in line with the case law, as in *Piau*, the Court of First Instance concluded that FIFA is an undertaking with respect to regulation of agents.¹⁶⁷

For the purposes of Article 102 TFEU, the clubs are active on the market in such a substantial fashion that it can be concluded that FIFA is an emanation of clubs regarding the transfer rules.

2.4 The nature of the transfer rules

The Transfer rules are organizational rules governing transfer of players. This subchapter examines whether transfer rules are a decision of an association of undertakings or an agreement between undertakings. Egger and Stix-Hackl submit that it is not appropriate to analyze each individual component of a system, as the elements are connected and form a wider complex

¹⁶⁶ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 84.

¹⁶⁷ Case T-193/02 *Laurent Piau v. Commission* [2005] EU:T:2005:22, para 75.

system. I do not therefore strictly limit the examined rules to transfer fees, but instead I examine the whole transfer system with special consideration of the role of transfer fees and how they interact with different components of the transfer regulation, presented in Chapter 2.

In his opinion in *Bosman*, AG Lenz did not make a distinction whether transfer rules are a decision or an agreement. Indeed, beyond procedural law, there is little significance in distinguishing between a decision or an agreement, as long as the transfer rules fall within one of these categories.¹⁶⁸

The transfer rules in form of RSTP were issued by FIFA Executive Committee on the legal basis of Article 5 of FIFA Statutes. The article stipulated that “[t]he Executive Committee shall regulate the status of Players and the provisions for their transfer in special regulations”. The FIFA Executive Committee transformed into FIFA Council as a part of a reform aimed at improving football governance following the corruption scandal of 2016. The transfer regulation provision in Article 5 was replaced by a provision nonrelated to transfers. The authority of FIFA Council with regards to RSTP can be deduced from the broad wording of Article 34 of FIFA Statutes.¹⁶⁹ In practice the RSTP was amended by the FIFA Council multiple times since its inception. This change has little effect on the nature of transfer rules.

The transfer rules are legally binding when it comes to international transfers. Regarding national transfers, according to the settled case law is not significant whether the rules are legally binding or a mere recommendation, as long as they are followed by the substantial part of the market.¹⁷⁰ Nevertheless, international transfers constitute a substantial part of the transfer system. It therefore follows that any anti-competitive effects of international transfers would render the whole system anticompetitive, regardless of whether national rules are compliant or not. Based on the way transfer rules were adopted, as a decision of a body on the basis of the statutes of the association, I submit that the transfer rules are a decision within the meaning of Article 101 TFEU.¹⁷¹

¹⁶⁸ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 85.

¹⁶⁹ Section 11 of Article 34 of FIFA Statutes provides that “The Council shall issue regulations generally and, in particular, the FIFA Governance Regulations.”

¹⁷⁰ Joined Cases 209-215 86 218/78, *Van Landewyck u. European Commission* [1980] EU:C:1980:248, paras 86 and 89 cited in Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 85.

¹⁷¹ Egger and Stix-Hackl reach the same conclusion in *ibid.*

2.5 Restriction of competition or abuse of dominant position

This chapter explores whether restriction of competition within the meaning of Article 101 TFEU (Chapter 2.5.1) or abuse of dominant position within the meaning of Article 102 TFEU (Chapter 2.5.2) take place, and if so, to what extent.

2.5.1 Restriction of competition

There are two ways in which an agreement may be restrictive – by object and by effect. When determining whether a rule is restrictive or is a result of an abuse of dominant position, it is necessary to do so in the context of the rule, as was shown above. First, it is necessary to establish the object of an agreement. The effects on the other hand are to be scrutinized only when a clear restrictive object is not established.¹⁷² It follows that to establish a restriction by object, it suffices if an anti-competitive object is established by demonstrating that the restrictions pursued in light of the objective have a high potential of negative effects on competition, the effects do not need to be demonstrated.¹⁷³ Finally, to establish a restriction by effect, it suffices if the adverse effect is potential, it does not need to be an actual effect.¹⁷⁴

The objective is established by assessing the objective claims of the agreement, with the subjective intent of the parties being irrelevant. In sporting context, it is important to distinguish whether the pursued objective is legitimate or not. In the 2011 Communication on “Developing the European Dimension in Sport”, the European Commission has taken a view on which objectives it considered legitimate: “[l]egitimate 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”).¹⁷⁵ Apart from the European Commission guidelines, both the Court and the European Commission showed in the case law they produced which sporting objectives they recognize as legitimate. This case law is briefly presented further.

¹⁷² Lorenz, M. (2013) *An Introduction to EU Competition Law*. Cambridge [UK]: Cambridge University Press, p. 92.

¹⁷³ European Commission (2004) “*Guidelines on the application of Article 81(3) of the Treaty*”, OJ No. C 101, par. 21.

¹⁷⁴ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 84.

¹⁷⁵ European Commission “*Developing the European dimension in sport*” COM 12 final, 18 January 2011. sec. 4.2.

In *Bosman*, the Court ruled on the legality of the football transfer system, in which players, at the time, were not free to choose their employing club after expiry of their current contract. It held that the objective of maintaining a balance between clubs by preserving a certain degree of neutrality and uncertainty of result as legitimate. Furthermore, the Court found that the objective of encouraging the recruitment and training young players a legitimate objective as well.¹⁷⁶

In *Lehtonen*, the Court ruled on the legality of late season transfers within the transfer window rules in basketball. It held that regularity of sports competition is a legitimate objective, since it ensures comparability of the results between the teams taking part in a championship.¹⁷⁷

In *Meca-Medina*, the Court ruled on anti-doping rules. The Court of First Instance (now General Court) found that anti-doping rules were intended to preserve the spirit of fair play, without which sport would no longer be sport. In addition, the Court also considered the negative effect doping may have on health, thus finding that the anti-doping rules also sought safeguarding the health of athletes. Both fair play and safeguarding the health of athletes were found to be legitimate objectives.¹⁷⁸

In *Olympique Lyonnais v. Bernard*, the Court ruled on restrictions of football player mobility by means of proportionate training compensations schemes, which rely on training costs.¹⁷⁹ The Court first confirmed *Bosman* as to compensation schemes for the training of young players pursuing the objective of encouraging the recruitment and training of young players. According to Pijetlovic, the Court adds emphasis on the social importance of sport as opposed to other employment sectors. However, as opposed to *Bosman*, where training compensation schemes were viewed as unsuitable for the objective of *encouraging* (emphasis in original) the recruitment and training of young players, in this case they were deemed suitable.¹⁸⁰ To that point, in her opinion, Advocate General Sharpston considered the rule as perhaps not *encouraging* as such, but at least *not discouraging* (both emphases added) from recruiting and training young players.¹⁸¹

¹⁷⁶ Case C-415/93, *Bosman*, [1995] EU:C:1995:463, par. 106.

¹⁷⁷ Case C-176/96, *Lehtonen* [2000] EU:C:2000:201, par. 60.

¹⁷⁸ Case T-313/02 *Meca-Medina and Majcen v. Commission*, [2004] EU:T:2004:282, par. 44.

¹⁷⁹ Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, [2010] EU:C:2010:143.

¹⁸⁰ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., pp. 126-127.

¹⁸¹ Opinion of AG Sharpston in Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, [2010] EU:C:2010:143, par. 46.

Even though the restriction may be based on a pursuit of a legitimate objective, that restriction must nevertheless be inherent in the pursuit of its objective. Finally, the rule must be proportionate in relation to its objective, and must be applied in a transparent, objective, and nondiscriminatory manner.¹⁸²

In *ISU v Commission*, General Court examined a rule of ISU, the regulatory body of speed ice skating, which required that any events organized by a third party were conditioned on an approval by ISU. Therein, ISU provided no criteria on which an approval would be based and had a full discretion whether to approve or refuse an event. General Court concluded that since the rule could lead to adoption of refusal decision on grounds which are not legitimate, it was therefore not clearly defined and transparent, and was of a discriminatory nature.¹⁸³ However, General Court noted that the pursuit of commercial interest can constitute a legitimate objective even for a sports regulatory body, as it is an inherent feature of any undertaking. In the present case, the measures were deemed to be disproportionate.¹⁸⁴ Nevertheless, ISU lodged an appeal to the Court of Justice, and at this time a judgement has not been yet rendered.

So far, it is established that on the player supply market, FIFA is an association of undertakings with respect to transfer rules, and the transfer rules themselves are a decision of an association of undertakings.

No special chapter is dedicated to proving the appreciable effect on the trade between Member states, as this is a straightforward assessment. The concept of effects on trade between Member States serves to establish jurisdictional threshold between the areas of EU and Member States' competence.¹⁸⁵ From the case law of the Court, it is long established that "*it must be possible with sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States.*"¹⁸⁶ Furthermore, the effect must be appreciable. As was shown above, a potential effect is

¹⁸² Case C-1/12 *Ordem dos Técnicos Oficiais de Contas*, [2013] EU:C:2013:127, par. 99, also in European Commission (2007) "*The EU and Sport: Background and context. Accompanying document to the White Paper on Sport*" (Commission staff working document) COM 395, 11 July 2007. sec. 2.1.5.

¹⁸³ Case T-93/18, *International Skating Union v Commission* [2020] EU:T:2020:610, paras. 88-89.

¹⁸⁴ *Ibid.*, paras. 109-110.

¹⁸⁵ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, p. 301.

¹⁸⁶ Case 42/84 *Remia v Commission* [1985] ECR 2545, par. 22

sufficient, combined with foreseeability and a sufficient degree of probability.¹⁸⁷ The threshold for the criterion of appreciation is according to Egger and Stix-Hackl ‘very low’.¹⁸⁸

To that end, it suffices to show that in 2018, transfer fees for domestic and international transfers in Europe alone constituted more than €10 billion, almost half of the total revenue of the clubs at that year.¹⁸⁹ This subchapter examines whether the transfer rules distort competition either by their object, or by their effect.

At first sight, the transfer regulation does not appear to have restriction of competition as its object. To the contrary, the regulation aims to fulfil the principles of fairness and openness of the competition. The specific objects of the transfer rules are mainly to ensure a fair and balanced competition to promoting youth development while protecting minors,¹⁹⁰ as well as to promote contract stability.¹⁹¹

Promotion of contract stability could have restriction of competition as its object. Especially if interpreted strictly to the detriment of rights of football stakeholders, such as right of movement for players. For appraisal of transfer fees, this issue is mostly of contextual importance. Both Parrish¹⁹² and Pearson¹⁹³ find restrictions arising from rules on contract stability not in construction of the provision itself and its object, but mainly in its interpretation and enforcement as its effects. Therefore, I conclude that the transfer fee regulation is not a restriction by object.

As for restriction by effect, I observe two core restrictive effects of the transfer fee regulation, one impacting the clubs and one impacting the players. Aside from transfer fees, the economic inequality of clubs translates to high wages for higher primary market players. However, this kind of inequality is natural and follows the laws of free market.¹⁹⁴ As such, wages can be restricted by

¹⁸⁷ Case 99/79 *SA Lancôme and Cosparfrance Nederland BV v Etos BV and Albert Heyn Supermart BV*, [1980] EU:C:1980:193, par. 23.

¹⁸⁸ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 89.

¹⁸⁹ Hoey, S. et al. (2021) The transfer system in European football: A pro-competitive no-poaching agreement? *International journal of industrial organization*, 75, p. 2.

¹⁹⁰ KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission, p. 2.

¹⁹¹ RSTP Article 13.

¹⁹² Parrish, R. (2015) Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law. *Maastricht Journal of European and Comparative Law*, 22(2), p. 270.

¹⁹³ Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football ‘Transfer System’, *European Law Journal*, 21(2), p. 228.

¹⁹⁴ Where better workers get better wages.

rules that are inherently in pursuit and proportional to a legitimate objective. So far, no parity seeking wage restricting rules, such as the North American salary caps, are in place on the international level, although the sustainability seeking restriction on total spending introduced by the Financial Fair Play Regulation can be seen that it translates to a de facto restriction on wage spending. Transfer fees, in contrast to wages, are not a natural phenomenon.

For clubs, the system at first sight causes restriction in their access to engage players at the supply market. This is particularly true at the higher primary market where elite players are recruited, and where transfer fees rise in a fashion that is rather hyperbolic than linear.¹⁹⁵ Norbäck et al. observe that this rise of transfer fees for elite players can be attributed to the stronger bidding contest that was enabled by *Bosman* so far as it removed the nationality quotas.¹⁹⁶ It is players recruited at higher primary market who are essential for sporting success at European level and at domestic levels at the best European associations. Sporting success leads to prize money for clubs that participate and advance to latter stages of competitions, as well as associated revenues from broadcasting rights and other marketing opportunities. That makes sporting success a necessary requirement for improving the clubs' economic situation. This link is also observed by an updated KEA/CDES study, which notes a relation between money spent on transfers, sporting results and economical revenues, that shows an increasing gap between both the clubs in top leagues and also between the different leagues.¹⁹⁷

However, smaller clubs are prevented from improving their sporting performance and therefore their long-term economic level, since they cannot afford to engage good players because of the transfer fees required to engage them. On the other hand, it could be argued that clubs can engage players whose contract runs out and therefore transfer fees do not substantially restrict their access to them. However, a substantial number of transfers taking place on the higher primary market are not end-of-contract transfers. Not many players even reach the stage of their contract when other clubs can negotiate a free transfer with them. Clubs who face losing their players on a free transfer

¹⁹⁵ In 2013, the commotion that is normally caused by a broken transfer fee record surrounded the transfer of Gareth Bale for a fee of €100 million. Four years later, a new transfer fee record was set for the transfer of Neymar at €222, more than double the amount. And that is only for players whose fee was 'affordable' enough to make the transfer happen. Many players were simply unattainable for all but few clubs just because of the required transfer fee amount.

¹⁹⁶ Norbäck, P. J., et al. (2021) Talent development and labour market integration in European football. *The World Economy*, 44(2), p. 401.

¹⁹⁷ KEA and CDES, An update on change drivers and economic and legal implications of transfers of players, *Final Report to the DG Education, Youth, Culture and Sport of the European Commission* (2018), p. 56.

are motivated to sell the player before the contract expires to recoup a portion of the transfer fee previously paid for them.

This effect is further amplified by the additional regulation presented in Chapter 2.2.5. The ban of third-party ownership prevents clubs from bridging the wealth gap in order to recruit better players with the help of a third-party investor. As such, they are left to other modes of financing. Nevertheless, as a result of the FIFA Financial Fair Play, other financing options are limited too. Because of the break-even rule of the FFP, clubs cannot improve their competitive success by heavy investment anymore. The issue is that clubs have been previously allowed to do that, and many have. The FFP therefore entrenches the clubs that were the objects of investment before FFP, as new clubs cannot break in this elite level as some of the clubs have done before.

The restrictive effects of contract stability rules that translates to transfer fees can be observed from the way CAS has calculated compensations in player induced breach of contract cases. In some of these, the transfer fee paid for the player in breach became a basis for the final compensation. In *Matuzalem*,¹⁹⁸ CAS considered the market value of the player, the calculation of which was based on transfer payments. That included costs of replacement, which essentially means a transfer fee for a player of equal market value. This resulted in a total amount of almost €12 million. Likewise, in *De Sanctis*,¹⁹⁹ replacement costs were a part of the calculation that resulted in €2.2 million. The impact of transfer fees can be well observed in comparison of *Matuzalem* and *De Sanctis* to an earlier case of *Webster*.²⁰⁰ Therein, the compensation was determined solely on the residual salary of his contract and amounted to £150 000, even though the club claimed £4.9 million based on the estimated transfer value. Since then, the basis for compensation varied slightly, but never came back to *Webster*.²⁰¹

Based on the proposal that transfer fees restrict access to higher and potentially lower primary market players, it follows that the compensation calculation further intensifies the restriction. The reason is that any new club who would try to contract a player who owes compensation is jointly liable together with the player. In such cases, the compensation would include the market value of the player. Therefore, players who breached their contract would be undesirable for any potential

¹⁹⁸ *Shakhtar Donetsk v. Matuzalem* [2008] CAS Decision: 2008/A/1519.

¹⁹⁹ *Udinese v. De Sanctis* [2010] CAS Decision: 2010/A/2145–2147.

²⁰⁰ *Heart of Midlothian v. Webster and Wigan Athletic* [2008] CAS Decision: 2007/A/1298–1300.

²⁰¹ Pearson, G. (2015) Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football ‘Transfer System’, *European Law Journal*, 21(2), p. 228.

employer. In extreme cases, this could result to removing them from the market altogether, which would in effect further shrink the supply on the market and accordingly increase prices.

For players, the transfer fee system can lead to a substantial detriment if a player is found liable for a compensation. In addition, the system leads to wage deflation. That is because clubs, who have allocated a budget for an acquisition of the player divide this budget into wages and transfer fee. It follows that the higher the transfer fee, the lower the resulting wage.²⁰²

Based on the arguments presented above, I contend that the transfer system presents a restriction to competition within the meaning of Article 101 TFEU.

2.5.2 Abuse of dominant position

AG Lenz concluded in his opinion in *Bosman* that the transfer rules at the time were not an abuse of dominant position. The argument was that the players were not competitors, customers nor consumers at the market where clubs exercised their power in engaging players. Since the transfer system only affected the relationship between clubs, and the *Bosman* challenge affected the relationship between the club and players, he saw no abuse of dominant position.²⁰³ However, the scope of this thesis is broader than the preliminary question raised in *Bosman*, which only considered the relationship between the club and a player whose contract has expired. I therefore examine the dominant position of some clubs in relation to other clubs as their competitors.

On pitch success is clearly linked to two factors that are both forms of spending. One factor is high wages, where clubs that spend more on wages have more competitive success. The other is transfer spending, where clubs that spend more on transfer fees have more competitive success. While the two are linked, their impact is not equal. Transfer fees present a bigger barrier for small clubs to engage players than wages alone, as wages are a natural phenomenon.

²⁰² In addition to transfer fees and wages, additional portion of the total cost for the player comes from intermediary fees. Following the introduction of the 2015 FIFA Regulations on Working Intermediaries, provided by Article 7 there are two kinds of intermediary fees for intermediaries working on behalf of the players. The first one is linked to the transfer fee and is not capped, commonly referred to as agents' fee. It is commonly negotiated in a transfer. The second is linked to both the fee and the player's wage, where the fee shall not exceed 3% of either the size of the compensation or the players income for the entire duration of the contract. Remuneration for intermediaries acting on behalf of clubs are not capped. For the purpose of this thesis, intermediary fees a minor expense with the exception of superstar players and as such are not closely examined.

²⁰³ Opinion of AG Lenz in Case C-415/93 *Bosman* ECR1995 I-4921, para. 286.

Based on the economic conditions and sporting successes, it is relatively easy to see which clubs are enjoy commercial and competitive success. The wealthiest 20 clubs in the 2018/19 season accounted for €9.2 billion in revenues, over 30% of the €28.9 billion total revenue of European clubs.²⁰⁴ Whereas no individual club could be considered dominant on its own, at least on the European level, the most successful clubs can be considered collectively dominant. Although the list of clubs which can be considered dominant varies slightly, the core of this group is stable. The clubs are not exactly hiding their status of collective dominance either, as the clubs unite in lobby groups to protect their interests.

The first organization in modern history was the G14, which grouped the leading clubs at the time. The membership was open to invitation only, and only 4 more clubs were invited to the organization alongside the founding 14 clubs. The members won close to 250 national league titles and winning the UEFA Champions League title 41 times in 51 seasons. The G14 was replaced by the European Club Association. While the membership in ECA is less exclusive than in G14,²⁰⁵ the executive board composition still favors the elite clubs. Whereas the organization aims to provide a platform for the clubs in the football stakeholder dialogue that UEFA created the conditions for, it seems that the elite clubs that are the voice of ECA have somewhat different interests than the other members. In a persuasive manner, Pijetlovic goes so far as to suggest that the broad membership is just a ‘smoke screen’ to give legitimacy to the decisions of ECA and portray them as a decision of a representative body of all clubs.²⁰⁶

There were occasions when the clubs pushed back on organizational rules that did not follow their interest. One example is the conflict about the Compulsory Player Release Rule that mandated the clubs release their players for international matches. The rule was challenged before the Court in the *Oulmers*²⁰⁷ case, but the dispute was settled before a judgement was rendered.

²⁰⁴ Deloitte Football Money League 2020, p. 9.

²⁰⁵ There is at least one member from each of the 54 associations. The higher the ranking of the association, the more members positions are open for the clubs of the given association. The association ranking is determined based on the performance of its clubs in the European competitions.

²⁰⁶ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 79.

²⁰⁷ Reference for a preliminary ruling from the Tribunal de commerce de Charleroi submitted on 30 May 2006, Case C-243/06 *SA Sporting du Pays de Charleroi, G14 Groupment des clubs de football européens v. Fédération internationale de football association (FIFA)*. The case was removed from the Court register by order of the President of the Court of 25 November 2008.

The ultimate leverage that the dominant clubs use to influence other stakeholders is the threat of a breakaway league. Post-Bosman system saw a series of attempts.²⁰⁸ The latest was launched in April 2021 when 12 clubs announced that they would form a separated competition from UEFA, the SuperLeague. The project soon crumbled after the founding clubs withdrew from the project because of the protests they faced on behalf of the fans.²⁰⁹ While the failed attempt slowed the momentum down, the consensus remains that the threat as such is not going away any time soon.

It is therefore proved that there is such a structure of dominant clubs, and that they leverage their power to influence the rulemaking of FIFA and UEFA so that it is in line with their commercial interests. The structure of the higher primary supply market shows that it is these clubs who benefit from their economic status in that by paying high transfer fees they engage the best players in order to win competitions. The transfer fee system, at least on the higher primary market, almost has an effect of monopoly on the top players. This monopoly serves as a barrier of entry behind which are the top clubs entrenched in their position of success, both competitive and commercial. In effect, that barrier prevents other clubs to break in a position of competitive and economic strength. Nevertheless, that holds less true on the lower primary market and not at all at the secondary market. Whereas players from the lower primary market can be useful for a club which seriously competes for a trophy associated with significant economic boost,²¹⁰ the dominant clubs can afford to overpay on the transfer fee and therefore preclude their opponents from engaging the lower primary market players, and thus prevent effective competition, at least potentially. The situation is different at the secondary market where players generally either transfer after expiry of their contract or for a very low transfer fee.²¹¹ However, the secondary market is of marginal importance in pursuing success on both the exploitation and the contest market. The economic strength and resulting share of the player supply on the higher primary market, along with the potential barrier

²⁰⁸ Such as the Media Partners proposal, a project which if completed would replace the UEFA Champions League, or the 2011 attempt that was used to negotiate fewer international matches. For a detailed analysis see Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, pp. 55 et seq.

²⁰⁹ For a detailed analysis of the SuperLeague project, see Peers, S., Never Let a Good Fiasco Go to Waste: Why and How the Governance of European Football Should Be Reformed after the Demise of the 'SuperLeague', *EU Law Analysis*, <http://eulawanalysis.blogspot.com/2021/04/never-let-good-fiasco-go-to-waste-why.html> [Accessed 28 April 2021].

²¹⁰ The impacted competitions are especially the European competitions and national league titles in the bigger leagues.

²¹¹ At the secondary market, more than two thirds of transfers take place out of contract, per FIFA TMS Global Transfer Market Report 2019, p. 13.

enforcing effects on the lower primary market constitute the link between economic success translating into competitive success.

However, even if the dominant clubs benefit from this system, that does not automatically mean that they abuse it. I do not observe any clear link which would establish that clubs act unilaterally against the non-dominant clubs, for example in the form of predatory pricing or refusal to supply. On one hand, there is clear evidence, as provided by the KEA/CDES report, that the dominant clubs are the overall beneficiaries of the transfer system.²¹² The conclusion that I draw is that despite the dominance the clubs enjoy, the clubs ‘use’ rather than abuse the system. A clear indicator of an abuse would be if the dominant clubs resisted against any change FIFA would seek so that they leverage their influence in order to maintain a status quo from which they benefit. While it could be argued that the dominant clubs prevent general redistribution through their opposition of UEFA’s attempts to open the European competitions to more participating clubs, the link to the specific redistribution of the transfer system cannot be established. Whereas it is impossible to rule out any informal influence on behalf of the dominant clubs to force FIFA’s hand, I am however not aware of any formal effort FIFA made which could be then opposed by the dominant clubs, formally or informally. I therefore do not find an abuse of the transfer system within the meaning of Article 102 TFEU on behalf of the clubs which collectively dominate the higher primary market.

2.6 Justification

There are generally several ways a rule can achieve exception from the provisions in Articles 101 and 102 TFEU. While the doctrine presents them as separate, the procedure is quite similar, as will be shown further. Nevertheless, this thesis follows the traditional division for the sake of keeping the arrangement clear.

The first way for a rule to qualify for an exception is to pass the *Wouters* test as outlined above. Outside of sporting context, the Court applies this balancing test in cases where public policy considerations stand in need of certain restrictions of competition.²¹³ In sporting context, it is the

²¹² KEA and CDES, (2013) *The Economic and Legal Aspects of Transfer of Players*, Report for the European Commission., p. 249.

²¹³ Lorenz, M. (2013) *An Introduction to EU Competition Law*. Cambridge [UK]: Cambridge University Press, p. 39.

sporting objective instead of public policy consideration that might require and therefore justify a restriction of competition. In case a rule does not pass the test, there is the traditional recourse, which is the efficiency exception in Article 101(3) TFEU for the restriction contained in Article 101(1).

Further restraints that escape the prohibition are those which have no appreciable impact on trade between Member States and are thus considered as harmless and of minor importance, known as the *de minimis doctrine*.²¹⁴ Moreover, ancillary restraints, a term for restrictions which are directly related, objectively necessary for, and proportionate to the implementation of the main nonrestrictive transaction, qualify as an exception as well.²¹⁵ Next, restrictions which are a product of collective bargaining between employee and employer association that improve employment and working conditions fall outside the scope of the provision, since they pursue social policy objectives.²¹⁶ Lastly, agreements between persons forming a single economic entity, full-function joint ventures, individual employment agreements, and principal-agent agreements typically fall outside the scope as well.²¹⁷ Nevertheless, the transfer fee system does not fall within any of these categories.

To link all the exceptions together, a restrictive agreement seeking exemption that pursues a public policy objective that is not already protected by public regulation would undergo the *Wouters* test. If the *Wouters* criteria are not satisfied, the agreement then must satisfy the four conditions of Article 101(3) to qualify for the efficiency exception. To that point, Pijetlovic contends that a rule which failed the *Wouters* test on the point of proportionality, or a rule that pursues non-competition goal which cannot be translated into economic efficiencies and affects trade between Member States, is unlikely to satisfy the economic condition of Article 101(3). If the conditions of Article 101(3) are not satisfied, the agreement is automatically void as is stipulated by Article 101(2).²¹⁸

For comprehensiveness, the exception for violation of Article 102 TFEU is briefly presented further, even though no evidence of abuse of dominance was found. While Article 102 TFEU does

²¹⁴ For *de minimis doctrine* see the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ C 368/07, 22.12.2001.

²¹⁵ Pijetlovic, K. *EU Sports Law and Breakaway Leagues in Football*. Asser Press, 2015, p. 152.

²¹⁶ Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paras. 59-60

²¹⁷ Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 154

²¹⁸ *Ibid.*, p. 184

not have its own exception provision, the Court and the Commission nevertheless developed a practice of exceptions that are analogous to the way exceptions are applied for Article 101 TFEU. The way goes through use of the concept of objective justification.²¹⁹

Objective justification for Article 102 TFEU is in essence a term containing exceptions analogous to those applicable under Article 101 TFEU. According to Pijetlovic, the *Wouters* test is essentially a remodel of the objective justification, with the criterion of inherency added to it.²²⁰ There are three situations where an alleged abusive conduct could be objectively justified. The first one is when a dominant undertaking reasonably protects its commercial interests out of objective necessity. Or in other words, by a legitimate business behavior, the purpose of which is not to abuse dominance.²²¹ The second one is based on efficiency considerations, analogous to the efficiency exception in Article 101(3) TFEU. In this situation, an advantage in efficiency shared with the consumer may justify an exclusionary effect disadvantageous for competition arising out of market dominance.²²² The third one is a non-efficiency public policy exemption, which is in theory applicable²²³ where a prima facie abusive conduct would be beneficial to the consumer, perhaps more as a member of society rather than directly.²²⁴

2.6.1 Justification through the *Wouters* test

According to the *Wouters* test, account must first be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. Then, it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them

²¹⁹ *Ibid.*, p. 161.

²²⁰ *Ibid.*, p. 183.

²²¹ Case 27/76 *United Brands v Commission* [1978] ECR 207, par. 189.

²²² Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, par. 86, and more recently Case C-413/14 P *Intel Corp v Commission* [2017] EU:C:2017:632, par. 140.

²²³ This exception was not granted yet, but CJEU recognized the possibility of doing so. See for example Case C 53/92 P *Hilti v Commission* [1994] ECR I-667, where Hilti sought an objective justification based on public safety.

²²⁴ Dunne provides a good example of “a refusal to continue to supply access to an indispensable but highly polluting input controlled by a dominant firm” in Dunne, N. (2020) Public Interest and EU Competition Law, *The Antitrust Bulletin*, 65(2), p. 267.

The major objectives that shape the transfer regulation are to maintain a competitive balance and to promote youth development. Both objectives were affirmed in *Bosman* as legitimate. Additional objectives that are stated in the 2001 agreement are to protect the stability of contract and to safeguard transparency. Whereas transparency is an administrative issue and as such is not discussed, stability of contract is discussed to the extent of which transfer fees are affected.

Maintaining a competitive balance, or in the language of *Bosman*, preserving a certain degree of equality and uncertainty as to results, is achieved through profit redistribution in the context of economic equality of the competitors. To assess redistributive effects of transfer fees, all major redistributive mechanisms are presented for the overall context.

The first way is redistribution through various programs to support grassroots football. According to FIFA, 81% of its revenue was reinvested back to football through contributions to each member association and each confederation in the 2015-2018 cycle. For some of the investments, FIFA requires the target association to organize youth and women competitions.²²⁵ On the same note, UEFA provides solidarity payments to national associations as well. This mode of redistribution is observed as particularly effective for youth development, as it provides the recipient clubs with 50-100% of their youth development budget.²²⁶

The second way takes place through tournament prize money. In European context, the most substantial tournament redistribution takes place in the European competitions. In particular, the UEFA Champions League provides the most substantial prize to compete for. Through tournament structuring and payout schemes, UEFA can substantially influence the way revenue is distributed to its participants. As for the impact of the Champions League redistributive effects, the KEA/CDES study found that the non-participating clubs, who competed for qualification but did not advance to the tournament itself, only received less than 7% of the total money received by the 32 participating clubs. This redistributive system is therefore skewed in favor of the elite clubs, which happen to be the most economically successful in their respective associations.²²⁷ In addition, the system leads to an increased market concentration that can be observed in comparison

²²⁵ FIFA 2020 Annual Report, p.

²²⁶ Arnaut, J. L., (2006) Independent European Sport Review, Annex III, p. 148., cited in Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press, p. 275.

²²⁷ KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission, p. 249.

of the Big Five Leagues²²⁸ and all others. Whereas between the years of 1985-1996, ten clubs from other leagues reached the semi-finals of the Champions League, in the subsequent decade it was only four. In the last observed decade between 2006-2017 no club from other league reached the semi-finals.²²⁹

On the other hand, the study does not include the monetary streams of the UEFA Europa League, where the redistributive effects can be presumed to be stronger since most of the participants are not as commercially and competitively strong as in the Champions League. The newly established Europa Conference League as a third-tier competition is presumed to redistribute money further down to the clubs who do not qualify for either the first-tier Champions League or the second-tier Europa League. On the other hand, the prize money is assumed be substantially lower than in higher tiers. It therefore remains to be seen how the tournament prize money redistributive system will affect competitive balance in the future.

Finally, the redistributive effects of transfer fees themselves can be categorized as either direct or indirect.

The direct redistribution happens where the buying club pays a transfer fee to the selling club. The selling club is generally the only beneficiary of the direct redistribution.²³⁰

The second, indirect redistribution, affects other clubs than the selling club, provided there are any. As tools of indirect redistribution, training compensation and solidarity mechanism as introduced in Chapter 1.2.4 are utilized. Profit redistribution rests on two arguments. The first is that the profit redistribution should in theory reward the clubs for training the players and act as an incentive to do so, thus fulfilling the objective of promoting youth development. The second is that the redistribution mechanisms either mitigate or neutralize the differences in economic situation of the clubs, thus fulfilling the objective of promoting competitive balance. If we assume that they are efficient, it follows that they would essentially discontinue the causality of commercial and

²²⁸ The Big Five Leagues are a notorious collective term for the top tier leagues of England, Spain, Italy, Germany, and France.

²²⁹ KEA and CDDES, (2018) An update on change drivers and economic and legal implications of transfers of players. Final Report to the DG Education, Youth, Culture and Sport of the European Commission (2018)., p. 55.

²³⁰ Unless there is a sell on agreement with the preceding club to the selling club, which provides the preceding club with a percentage of a transfer fee in case of a future transfer. That is generally compensated by a lower immediate transfer fee. As it replaces a portion of the original preceding transfer fee, I consider it as a form of a direct redistribution rather than indirect.

competitive strength, where one is almost a requirement of the other.²³¹ It is evident that the profit redistribution mechanisms should in theory mitigate the natural financial polarization of competitors to level the playing field, as long as the substantial amount of transfers takes place from a relatively poor to relatively rich clubs. At this point, I recognize that the profit redistribution mechanisms are inherently in pursuit of the legitimate objective of competitive balance.

To find out if transfer fees really achieve these objectives, I consider monetary flows of transfers. As for the direct redistributive effect of transfer fees, Hoey et al. found that the alleged effects between both clubs and associations are rather small. The only significant redistributive effect observed is one that takes place in the Champions League, where clubs with ambitions to win the cup are generally net spenders and other participating clubs are net gainers of the transfer system. The other participating clubs are generally the best of their national associations.²³² Given their frequent participation in the European competitions, it seems unlikely that the redistributive effects from these clubs further down have a substantial effect. Otherwise, these clubs would not qualify for the European competitions so frequently compared to opponents in their own national association.

As for the highest transfer fees, it is interesting to observe that a substantial part of them takes place between the clubs who are already elite. As observed by Szymanski, “*Transactions among these twenty clubs* [featured in the 2015 edition of Deloitte Football Money League] *alone amounted to €1.7 billion – between 15% and 20% of all transfer transactions in Europe. These transactions related to just 131 players and represented 58% of all sales by the top 20 clubs and 32% of all their purchases.*”²³³ There is an additional type of clubs that record net financial gains from transfers. These clubs share the characteristic that they are established enough in their national league and therefore compete every year in the Champions League, but they do not have an ambition to win.²³⁴ Therefore, they do not particularly attempt to retain their star players, and instead choose to sell them. The fee that they can secure is higher due to the exposure the players received in their Champions League matches and the resulting bidding wars of the elite clubs. In

²³¹ Not unlike a Catch 22 situation.

²³² Hoey, S. et al. (2021) The transfer system in European football: A pro-competitive no-poaching agreement? *International journal of industrial organization*, 75, p. 13.

²³³ Szymanski, S. (2015) The Economic arguments supporting a competition law challenge to the transfer system, p. 10, available at https://www.slideshare.net/Monty_FIFPro/stefan-szymanski-study-abusive-transfer-system-is-failing [Accessed 16 June 2021].

²³⁴ Typically best clubs in Portugal and the Netherlands.

an analogy where the elite clubs enjoy commercial and competitive success behind the barrier of entry that is constituted by the financial requirements to field a competitive team, these clubs would be the gatekeepers on the outside.²³⁵

In the matter of indirect redistributive effect of transfer fees, the findings are equally unconvincing. The KEA/CDA study found that solidarity compensations only account for 1.84% of the total agreed transfer fees within Europe.²³⁶ Even though the study is somewhat dated, there is nothing to indicate that solidarity compensations rose substantially. Although redistribution does take place from higher to lower leagues of the same national association, and from higher ranked to lower ranked national associations, its magnitude is insufficient to make any difference.²³⁷ It concludes that the effects of the indirect redistribution do not have a sufficient positive impact on competitive balance.²³⁸ Likewise, Hoey et al. argue that the redistributive effect of the transfer system is not strong enough to significantly reduce the gap between elite and other clubs.²³⁹ I find their conclusions persuasive.

I therefore conclude that while the transfer system is in pursuit of improving competitive balance, it does not achieve it. In order to do so, it would have to either mitigate the natural economic inequalities of the competing clubs with more magnitude, or somehow break the link with economic power and results in competition. As such, the system is not inherent to competitive balance, and it is not necessary to continue to the assessment of proportionality.

The other major goal of promoting youth development should compensate clubs for the training costs incurred for players who leave, and thus incentivize clubs to continue train new talent. As AG Sharpston observes in her opinion to Bernard,²⁴⁰ I too observe a difference between *not discouraging* and *encouraging* recruiting and training new players. I view the training compensation scheme as attaining the level of *not discouraging*, and the transfer fees themselves

²³⁵ Examples include Ajax Amsterdam, a publicly listed company, SL Benfica, a publicly listed company, and AS Monaco, a privately owned company with an owner seeking to make a commercial profit on his investment.

²³⁶ KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission, p. 7.

²³⁷ Ibid, p. 247.

²³⁸ KEA and CDES, (2013) The Economic and Legal Aspects of Transfer of Players, Report for the European Commission. p. 248.

²³⁹ Hoey, S. et al. (2021) The transfer system in European football: A pro-competitive no-poaching agreement? *International journal of industrial organization*, 75, p. 17.

²⁴⁰ Opinion of AG Sharpston in Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, [2010] EU:C:2010:143, par. 46.

as they translate into the solidarity compensation as positively *encouraging*. The reason is that whereas training compensation merely compensates clubs with training players, transfer fees reward them with profit. As noted above, the solidarity compensation is not large enough to have an impact on competitive balance. However, for promoting youth development, it may amount to an encouraging effect. In addition, this effects scales together with the transfer fee. Thus, a substantial amount trickles down in cases of higher primary market transfers where a transfer fee is paid. Hence it serves as an argument against criticism of escalating transfer fees.

The update on the KEA/CDES study contends that an adequate and proportionate rewards mechanism represents and fundamental incentive for clubs to foster development of young players and improve their training facilities,²⁴¹ although it presents so in context of transparency and does not assess whether this system presents adequate and especially proportionate rewards.

Norbäck et al. observe that the increased sale prices translate into a stronger incentive for clubs to train their own players. Accordingly, this explains the fact that whereas the competitive balance in the Champions League became worse, the competitive balance in international matches improved. The national teams in of smaller EU countries where the big clubs do not operate improved their performance. The authors attribute that to what they label as a ‘spillover effect’. That is in principle the result of increased player mobility that is observed post-Bosman, as players from smaller EU countries get the benefits of playing in bigger and better leagues. A category of clubs, described as ‘nursery’ clubs, is induced to prioritize training new players rather than directly challenge the elite clubs. Nursery clubs are clubs which do not have sufficient financial standing to compete in the Champions League. When they are therefore presented with an offer for their star player, often enhanced by the stronger bidding competition, they are more likely to sell the player as their chances to compete for prize money that is equal of better is slim.²⁴²

Based on this notion, it follows that in the current system, maintaining competitive balance and promoting youth development are mutually exclusive goals for this category of clubs. In addition, this category of clubs contains by far most clubs, as all clubs except those which regularly

²⁴¹ KEA and CDES, (2018) An update on change drivers and economic and legal implications of transfers of players. Final Report to the DG Education, Youth, Culture and Sport of the European Commission (2018), p. 52.

²⁴² Norbäck, P. J., et al. (2021). Talent development and labour market integration in European football. *The World Economy*, 44(2), p. 371.

participate or even achieve results in the Champions League are in this category. It therefore brings up the question which goal is more important.

It seems that the impact of the transfer system as a whole has had a positive impact on youth development, as clubs are incentivized to train better players. This can be evidenced by the improved competitive balance international competitions. It can be concluded that that the system is in pursuit of promoting youth development and does achieve it.

Do the positive effects of promotion of youth development justify the restriction in access to the higher primary and lower primary supply market? Based on the assumption that the restriction is intensified by the high transfer fees for these players, it is necessary to find out how much is the transfer fee based on objective criteria. Egger and Stix-Hackl contended that the main criterion should be cost of training,²⁴³ which was later affirmed by the Court in *Bernard*.²⁴⁴ If we apply the rationale of *Bernard* to transfer fees on the higher primary market, there is an evident discrepancy between the cost of training and the transfer fee. Even though actual training costs are unknown, the training compensation is based on a model that at least approximates the real cost on objective criteria, unlike transfer fees which contain a speculative dimension not related to costs of training. To illustrate, a maximum amount of training compensation is €810 000,²⁴⁵ whereas the transfer fee average ranges from €2.3 million to €2.5 million in the recent years,²⁴⁶ and maximum transfer fee recorded so far is €222 million.²⁴⁷ Whereas common transfer amounts for elite players are lower than the transfer fee record, they still regularly amount to tens of millions. However, many transfers of elite players take place just between the elite clubs that previously purchased the player and did not train him. In addition, even for transfers that directly reward training clubs with a fee, Szymanski contends that training relies on many outside factors and does resemble a lottery, and therefore it does not make sense to reward particular clubs.²⁴⁸ Contrary to this contention, there are clubs which are notorious for the quality of their football academies, particularly at the level

²⁴³ Egger, A., and Stix-Hackl, C. Sports and Competition Law: A Never-Ending Story? *European Competition Law Review*, vol. 23, no. 2, Feb. 2002, p. 89.

²⁴⁴ Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC*, [2010] EU:C:2010:143, par. 45.

²⁴⁵ For a player trained exclusively by UEFA Category 1 clubs, which can be considered to amount to the most advanced training possible.

²⁴⁶ FIFA TMS Global Transfer Market Report, p. 13.

²⁴⁷ For the transfer of Neymar from Barcelona to PSG in 2017.

²⁴⁸ Szymanski, S. (2015) The Economic arguments supporting a competition law challenge to the transfer system, p. 10, available at https://www.slideshare.net/Monty_FIFPro/stefan-szymanski-study-abusive-transfer-system-is-failing [Accessed 16 June 2021].

of participating but not enjoying a lot of success in the Champions League.²⁴⁹ Finding out to what extent is youth training random would be a potential opportunity for further research.

Based on the arguments, I see a clear disproportionality between transfer fees for higher primary market players and costs of their training. On one hand, the settled case law suggests that some sort of compensation for training is permissible in order to attain sport specific goals. On the other hand, even if it pursued legitimate goals, it must not go beyond what is necessary to achieve these goals. In the case of transfer fees for higher primary market players, the regulation clearly goes beyond what is necessary to promote the training of young players, as there is little link between transfer fees and actual costs of training. In particular, the high transfer fees for higher market primary players are the core cause of the restriction, and yet they bear no relation to actual costs. Furthermore, even if the regulation promotes youth development to some extent, it does not maintain a competitive balance. Arguably, it has made it worse. For these reasons, I contend that the current transfer regulation cannot be justified based on the *Wouters* test on the grounds that it is disproportional to promoting youth development and does not attain the goal of competitive balance.

2.6.2 Exception under Article 101 (3) TFEU

The transfer fee rules did not pass the *Wouters* test. However, they might still qualify for the exemption provision of Article 101 (3) TFEU. The purpose of the efficiency exception in Article 101(3) is to permit a pursuit of agreements, which are overall beneficial despite their negative effect on competition.²⁵⁰

Four conditions must be satisfied to benefit from the efficiency exemption. First, the agreement must improve the production or distribution of goods or promote technical or economic progress. Second, consumers must get a fair share of the resulting benefits. Third, disproportionate restrictions, that is restrictions which are not essential to the attainment of the objectives of the agreement, are not allowed. Fourth, the agreement cannot lead to elimination of competition in substantial part of the product in question.²⁵¹

²⁴⁹ Especially the top Dutch and Portuguese clubs.

²⁵⁰ Weatherill, S. (2014) *European Sports Law Collected Papers*. Vol. 2, T.M.C. Asser Press., p. 326.

²⁵¹ European Commission (2004) *Guidelines on the application of Article 81(3) of the Treaty*, OJ No. C 101, par. 34.

In general, only economic efficiencies are considered in this provision, but public policy objectives (such as environment protection, or more relevant for sports, culture) may be taken into account as long as they can be subsumed under one of the four conditions.²⁵²

I will employ an alternative approach by following the first step with the third step instead of the second one. As the regulation did not pass the *Wouters* test on the grounds of disproportionality, this becomes an obvious crucial point.

As for efficiency gains, none of the traditional concepts of cost efficiencies²⁵³ or qualitative efficiencies²⁵⁴ are applicable here. However, I speculate that new sport specific efficiencies could be envisaged. In this case, it is conceivable that the restriction of the supply market has in fact led to better performing exploitation market. Or in other words, that the spectators enjoy this level of imbalance better than they would enjoy a more balanced competition. Since in this speculative hypothesis a better product is delivered, it would amount to a qualitative efficiency. This argument would be supported by the rising popularity of the game and the amount of total revenues that are generated, some of which are further redistributed through the schemes presented above. Of all club football competitions, the Champions League is the one that attract the best broadcasting and sponsorship deals.²⁵⁵ That turns it into one of the most, if not the most popular competition in Europe, despite the starkest competitive imbalance it presents.²⁵⁶ However, it is necessary that the efficiency gain could not be achieved without the restriction. Whereas I am not persuaded by this argument, let us assume that some degree of efficiency is indeed gained. I leave it to further research to verify this hypothesis.

The proportionality test consists of two steps. First is to find whether the restriction is necessary, or indispensable, to achieve the efficiency. Second is to find out if the restriction is proportionate to the efficiency gain. Or in other words, if there are no less restrictive alternatives which would

²⁵² Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*. Asser Press., p. 155.

²⁵³ Such as synergies, economies of scale, economies of scope, development of new technologies, or production planning.

²⁵⁴ Such as R&D Agreements, License Agreements, Joint-Production Agreements or Distribution agreements.

²⁵⁵ The English Premier League in fact reports higher revenue. as it is counted as the sum of the revenues of its participants, who are frequent participants of the later stages of the UEFA Champions League. This affects sponsorship revenue, which accounts for the additional exposure in European competitions. The revenue of the UEFA Champions League, on the other hand, does not contain individual sponsorship deals of the participating clubs, but sponsorship deals of the tournament as such. This explains why a nominally lower revenue than of the Premier League does not mean lower commercial success.

²⁵⁶ The same effect is observed by Norbäck et al. in Norbäck, P. J., et. al. (2021). Talent development and labour market integration in European football. *The World Economy*, 44(2), p. 401.

also achieve the efficiency. The concept of proportionality²⁵⁷ within the Article 101(3) TFEU is not equal to proportionality of *Wouters* test. Whereas in the *Wouters* test, proportionality means whether the rule does not go beyond what is necessary in pursuit of sporting objective. Here, efficiency gains irrespective of objectives are weighed against the restriction. Therefore, the fact that transfer fees were found to be disproportionate under the *Wouters* test does not automatically make them disproportionate regarding Article 101(3) TFEU.

From the outset, it seems likely that some restriction to player supply market is necessary to maintain the quality of competitive football so that it is more enjoyable. Aside from the transfer windows which present an obviously necessary restriction, some compensations are also necessary so that clubs at least recover their costs of training a player. The transfer fees in their current state do not appear to be indispensable, as player training cost are recovered through the training compensation and aided by the solidarity mechanism. Even if transfer fees were necessary, they would also be very unlikely to be proportionate, as the restriction to player supply that they cause is of far greater magnitude than the improved consumer experience it could present in the exploitation market. For these reasons, I conclude that the transfer fee system does not qualify for the exception under Article 101(3) TFEU.

2.7 Discussion

The analysis showed that transfer fees as a part of the transfer system in its current form present a restriction by effect to the player supply market and as such breaches Article 101 TFEU. The regulation did not qualify for the *Wouters* exception on the following grounds. While the regulation pursues a legitimate sporting objective of maintaining competitive balance, its effect is not significant enough. The sporting objective of improving youth development is pursued and achieved by the regulation but was found disproportionate. The training compensation and the solidarity mechanism already fulfil this objective without being unjustifiably restrictive in their effects. The transfer fees on the other hand are not linked to actual training costs, and as such do not satisfy the condition in *Bernard*. We can observe a direct proportion between the size of a transfer fee and the barrier of entry it creates on the supply market, but the benefits of high transfer

²⁵⁷ The application guidelines to this article label the condition of ‘proportionality’ as ‘indispensability’.

fees do not translate into promotion of competitive balance at all, and to promotion of youth development only in part.

As for the abuse of dominant position within the meaning of Article 102 TFEU, evidence for abuse of dominant position by the dominant clubs was not found. Whereas these clubs are beneficiaries of the system, there was no indication of any abusive behavior. However, the provision of Article 102 TFEU could be triggered if these clubs leveraged their dominant status in order to prevent any changes in the system, for example in a threat to form a breakaway league.

However, I emphasize that I do not find transfer fees anticompetitive as such. Instead, they produce a significant anticompetitive effect because of their place in the today's overall organization of competitive football. The objectives of maintaining competitive balance could be achieved by the transfer fee regulation in its current state if other mechanisms of revenue redistribution would not contribute to competitive imbalance in the magnitude that they do now. In that case, the gap between the successful and other clubs could conceivably be bridged by transfer fees. For instance, if clubs were not restricted in their transfer spending by the Financial Fair Play Regulation, it would allow other clubs to leverage investments to challenge the successful clubs for competitive success. Without the ban on third-party ownership, clubs could employ third-party investments to pay transfer fees for players which they otherwise could not afford. I do not suggest that the FFP or the TPO ban are not justifiable. Instead, I submit that for the system to function properly, the transfer fee regulation needs to be modified to fit in the current football organization.

Possible modifications are unlikely to depart from the principles of openness and promotion and relegation of the European sports model. This assumption finds support in Article 165 TFEU, which includes openness as one of the key principles. The Northern American sports model of closed leagues and franchise system and the positive impact on competitive balance can serve as an inspiration for future development of football governance, yet an adoption of its features seems unlikely. For a proper adoption of the Northern American system, the whole system of football regulation would have to be revised from the top of the pyramid to the grassroots. The circumstances and sporting culture is just too different. In any case, the EU has taken a firm stand in support of the open model of promotion and relegation on a constitutional level through Article 165 TFEU.

However, some elements could still be adopted while maintaining the European principles. One alternative could be to establish the transfer regulation on a collective bargaining agreement, in which players represented by a union agree labor terms with other stakeholders. In addition,

abolition of transfer fees combined with salary caps could successfully remove or mitigate the barrier of entry for primary market players. For the regulatory bodies, the collective labor agreement would provide them with a strong shield against the interventions of EU law, as collective bargains fall outside the scope of Article 101 TFEU.

Other, more likely alternative would be to strengthen the redistribution mechanisms to increase their impact. The estimation of likelihood follows from the level of institutional support that the principles of European sports model receive, especially mechanisms of solidarity and financial redistribution between the elite and the grassroots level.²⁵⁸ This is the approach of the KEA/CDES study, which recommends increasing the percentage of solidarity contributions from 5% to 8%. Together with limiting transfer fees by linking them to salary and establishing objective criteria for use of buy-out clauses, these form the backbone of the recommendation of the study.²⁵⁹ Norbäck et al. on the other hand find unlikely that one system could achieve both objectives, as promotion of one goes against the other.²⁶⁰

Another fairly obvious solution would be to introduce a transfer fee cap, a limit on a maximum transfer fee. The threshold would need to be fine-tuned so that the cap functioned properly. I believe that it should be clearly connected to objective criteria in order to be compliant with the criteria from *Bernard*. Compared to salary caps, transfer fee caps are perceived to be a more attractive options,²⁶¹ and they would also cause less intensive restriction to remuneration opportunities for players.

Aside from the transfer fee cap, I believe that together with the increase of solidarity contributions, a proper balance may be found by introducing a luxury tax on transfer fees from a certain amount, the proceeds of which would be used to finance youth programs and academies. This would in effect slow down the rising transfer fees and lower the average transfer fee for higher primary market player. At the same time, it would provide a link that is currently missing between high transfer fees and promotion of youth development, albeit the selling club would not be the sole

²⁵⁸ See European Parliament (2007) “*Resolution of 29 March 2007 on the future of professional football in Europe*” (2006/2130(INI)), par. O.

²⁵⁹ KEA and CDES, (2013) *The Economic and Legal Aspects of Transfer of Players*, Report for the European Commission, p. 8.

²⁶⁰ Norbäck, P. J., et al. (2021). Talent development and labour market integration in European football. *The World Economy*, 44(2), p. 401.

²⁶¹ Gardiner, S. Welch, R., In: Duval, A., Van Rompuy, B. (Eds.). (2016). *The legacy of Bosman: revisiting the relationship between EU law and sport*. Springer, p. 74.

beneficiary of the sale. I consider this as a positive, as it would further strengthen competitive balance in the nursery leagues by allowing other clubs besides those that receive benefits from regularly playing European competitions to catch up.

However, in my view any modification to transfer fee would depend on the interaction with new regulation. Crucial point is the overhaul of Financial Fair Play, as it will most likely substantially contribute to the level of competitive imbalance that the transfer fee regulation seeks to reduce. At this time, it is not yet clear what it will look like. Likewise, it remains to be seen if and how other revenue redistribution schemes are adjusted, since they also substantially affect competitive balance, the lack of which transfer fees were supposed to correct. From a broad perspective, it invites a question for further research to what extent is the increasing commercial nature of sports compatible within the traditional structure of the European sports model. Whether clubs which focus on profit maximalization fit into the system of financial solidarity that is necessary for European sports to function looks to be an underlying theme of the stakeholder dialogue, where stakeholders decide on the future of football regulation.

Conclusion

The transfer fee regulation continues to attract attention even 25 years from *Bosman*.²⁶² In *Bosman*, the Court did not apply competition rules to the transfer regulation. Even though the European Commission has given a green light for the new transfer system in the aftermath of *Bosman*, provided that the objectives of the 2001 Agreement were followed, the system has since then changed. The economic changes together with new regulation caused the transfer system to depart from the one that was approved by the European Commission. The main goal of this thesis was to analyze transfer fees as a potentially problematic part of the transfer system in a way that I anticipate the Court would do in case of a challenge against the system on competition grounds.

In this thesis, I analyzed the transfer system based on the hypothesis that the transfer fee regulation is not compliant with Article 101 TFEU. The analysis confirmed my initial hypothesis, finding that transfer fees restrict access to the supply market and as such undermine the competitive balance. Following the framework from *Meca-Medina*, the analysis sought justification of the transfer system using the *Wouters* test. Accordingly, the transfer fee regulation was found to be a decision taken by an association of undertakings, and as such fell within the scope of Article 101 TFEU. Following the test, account was then taken of the objective of transfer fee regulations, which were (i) maintaining a competitive balance, and (ii) promotion of youth development. The system was then examined in context with other redistributive schemes of competition prize money and rules affecting competitive balance, namely the Financial Fair Play Regulation, rules on contract stability, the ban on third party ownership of players, and the Homegrown rule. I found that whereas the regulation pursues a legitimate objective of promoting competitive balance to maintain degree of uncertainty to the results, the positive effects are not significant enough to achieve that objective. As for youth development, I found that the system has a positive impact. However, I argued that transfer fees are not a proportionate mean to promote youth development, since the goal can be achieved with other, less restrictive means. Since the objective of maintaining competitive balance was not achieved and the objective of promoting youth development was achieved in disproportionate fashion, I concluded that the transfer system cannot

²⁶² C-415/93 *Bosman*, [1995] EU:C:1995:463.

be justified by the *Wouters* test. Consequently, the transfer system did not qualify for the sporting exception under *Meca-Medina*.

Since the regulation did not qualify for justification under the *Wouters* test, I considered the exception under Article 101(3) TFEU on the basis that some efficiency could be achieved to improve the product. This assumption was made in a speculative nature, and even as such would most likely be found disproportionate. Based on these arguments, I demonstrated that the transfer fee regulation is in breach of Article 101 TFEU and does not qualify for justification neither under *Meca-Medina* nor the exemption under Article 101(3) TFEU.

My second hypothesis that the transfer fee system was a result of abuse of dominance on behalf of the commercially and competitively successful clubs under Article 102 TFEU has not proved correct, since I found no evidence to demonstrate an abuse. However, this conclusion is subject to change. To this point, it will be of interest to observe the clubs conduct in the near future, as the regulatory landscape is likely to change following the Financial Fair Play overhaul due to the impact of Covid-19. Although it is unlikely that the clubs would try to launch another attempt at breaking away from the pyramid so soon after the last attempt in April 2021, I submit that such attempt as a leverage to maintain the status quo regarding the transfer system could amount to abuse of dominant position under Article 102 TFEU.

The position of these dominant clubs perhaps resembles a nuclear arms race, where the dominant clubs spend larger and larger amounts to maintain their position, approaching the brink of collapse. And anybody who joins the party on occasion is certainly not welcome to stay longer, nor can they with the expenses being so large.

The ongoing FIFPro challenge to the transfer system is currently on hold at least until 2023 following a successful negotiation with FIFA. It remains to be seen whether FIFA enacts changes to the transfer system to the satisfaction of both FIFPro and other stakeholders. Among those who stand to lose are the dominant clubs, which are currently unusually vulnerable, having lost some leverage after the failed breakaway attempt. FIFA, on the other hand, has arguably gathered a substantial momentum on the back of the Covid-19 pandemic and the resulting shock to football to enact significant changes that could deal with, among others, the concerns argued in this thesis. In the spirit of never letting a good crisis go to waste, the chances favor FIFA to use the mandate for football governance overhaul for good. Otherwise, FIFPro or another actor could eventually be prepared to shine the distress beacon so that the European Commission is summoned once again.

Seznam zkratek / List of abbreviations

CAS – Court of Arbitration for Sport

CJEU – Court of Justice of the European Union (including its predecessors)

FIFA – Fédération Internationale de Football Association

FFP – Financial Fair Play

IOC – International Olympic Committee

Member States – Member States of the European Union

RSTP – Regulations on the Status and Transfers of Players

TFEU – Treaty on the Functioning of the European Union

TPO – Third party ownership

UEFA – Union Européenne de Football Association

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Abstrakt / Abstract

Abstrakt:

V této diplomové práci posuzuji soulad jevu poplatků za přestupy fotbalových hráčů se soutěžním právem EU. Docházím k závěru, že systém fotbalových přestupů ve své současné podobě porušuje právo EU, a jako takový je zakázaným rozhodnutím sdružení podniků ve smyslu článku 101 Smlouvy o fungování Evropské Unie. Důvodem je, že systém představuje omezení přístupu na trh s hráči. Důsledkem je stav, ve kterém si kluby bez dostatečného finančního zázemí nemohou dovolit kvalitní hráče, kteří jsou předpokladem pro skutečnou konkurenceschopnost klubů jako soutěžitelů. Toto omezení není ospravedlnitelné testem souladu sportovních pravidel s právem EU z rozsudku Soudního dvora *Meca-Medina*, jelikož pravidla nedosahují cílů, které sledují. Systém není inherentní pro zlepšení soutěžní rovnováhy. Pro podporu rozvoje mládeže systém je inherentní existence určitých poplatků. Současná podoba systému poplatků za přestupy hráčů však překračuje meze toho, co je nezbytné, a je tedy disproporčním omezením. Systém zároveň nesplňuje podmínky pro udělení výjimky na základě článku 101 odst. 3 Smlouvy o fungování Evropské Unie. Dopady systému poplatků za přestupy hráčů však nemohou být posuzovány samostatně. Měly by být posuzovány v kontextu s ostatními prvky fotbalové regulace, zejména s mechanismy redistribuce zisků a omezení výdajů. V tomto kontextu přestupový systém zejména zvyrazňuje nedostatky Finančního fair play, a v důsledku přispívá k omezení konkurenceschopnosti klubů. Současné systémy přerozdělení zisků nemají dostatečný dopad na to, aby tyto negativní důsledky vyvážily. Subjekty zainteresované ve fotbalové regulaci by tedy měly klást důraz na to, aby reforma systému vedla ke splnění požadavků soutěžního práva EU. V současném období reforem organizačních pravidel fotbalu v souvislosti s reakcí na pandemii Covid-19 mají fotbalové sportovní organizace dobrou příležitost reformy prosadit.

Abstract:

In this master's thesis, I assess the compliance of the transfer fees used in football with EU Competition law. I submit that the transfer fee system in its current state is a decision of an association of undertakings that is not compliant with Article 101 TFEU due to the restriction it imposes on the player supply market. This restriction prevents small market clubs to recruit good players and compete with large market clubs. I argue that the restriction cannot be justified under the *Meca-Medina* framework since it does not achieve the alleged objectives. The system is not inherent in pursuit of improvement of competitive balance at all. Even though it is inherent to promotion of youth development, it goes beyond what is necessary, and as such is disproportionate to the restriction it causes. The system neither qualifies for the exception of Article 101(3) TFEU, since it does not result in any efficiencies. However, I suggest that the effects of the transfer fee system cannot be assessed in isolation, but rather in the context with other football regulation, especially revenue redistributive mechanisms and limits on spending. In this context, I found the transfer fee system to have an aggravating negative impact on competitive balance because. That is mainly a result of its interaction with the break-even requirement of the Financial Fair Play Regulation. I found other redistributive schemes not impactful enough to counter the negative effects on competitive balance. The football stakeholders should therefore attempt to reform the football system so that it is compliant with the requirements of the EU Competition law, as they would be likely held incompatible in their current state. The climate of necessity of football governance overhaul as a reaction to the impact caused by the Covid-19 pandemic provides a good opportunity for stakeholders to reform the system to be compliant with EU Competition law.

Klíčová slova / Key words

Klíčová slova:

Právo Evropské unie

Soutěžní právo

Bosman

Key words:

European Union law

Competition law

Bosman