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Safeguarding the European Sport Model in Professional Football: The EU Court of Justice's Delicate Task in Case European Super League Company (C-333/21)

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Lo sport va ben oltre la sua dimensione economica. Fa parte dell'identità e della cultura dell'Europa e persegue importanti obiettivi sociali, educativi e di coesione. Tuttavia, per quanto riguarda gli sport professionistici e il calcio in particolare, la dimensione economica ha normalmente avuto la precedenza. Il fatto che il diritto UE introduca limiti alle norme emanate dagli organi di governo sportivi non è una questione nuova. Tuttavia, i recenti avvenimenti, legati in particolare ad una rinnovata spinta da parte di alcune delle squadre di calcio più grandi e più ricche ad istituire "leghe separatiste", hanno portato nuovamente alla ribalta il rapporto tra diritto comunitario e sport.

Sports go way beyond their economic dimension. They are part of Europe's identity and culture, fulfilling important social, educational and cohesion purposes. However, when it comes to professional sports and football in particular, the economic dimension has normally taken precedence. That EU law introduces limits to the rules enacted by sports governing bodies is not a novel question. Nonetheless, recent events, notably related to a renewed push by some of the biggest and wealthiest football clubs to set up "breakaway leagues", have once again brought the relationship between EU law and sports to the spotlight.

1. Introduction

Sports go way beyond their economic dimension. They are part of Europe's identity and culture, fulfilling important social, educational and cohesion purposes. However, when it comes to professional sports and football in particular, the economic dimension has normally taken precedence. That EU law introduces limits to the rules enacted by sports governing bodies is not a novel question^[1]. Nonetheless, recent events, notably related to a renewed push by some of the biggest and wealthiest football clubs to set up “breakaway leagues”^[2], have brought the relationship between EU law and sports to the spotlight.

Three cases currently pending before the EU Court of Justice (“Court”)^[3] concern the intersection between sports and EU law. In *European Super League Company* (“*ESLC*”)^[4], and *International Skating Union*^[5], the compatibility with competition law of pre-authorisation rules for the organisation of sporting competitions other than those organised by the relevant governing bodies, coupled with sanctions in case of participation in unauthorised competitions, is at stake. Advocate-General Rantos Opinion in *ESLC* is expected next December 15. Moreover, in the *Royal Antwerp Football Club* case^[6], the so-called UEFA “home grown rules” are under scrutiny.

Below, I discuss the main issues raised by *ESLC*, particularly whether the rules on the organisation of international football matches established in FIFA and UEFA statutes^[7] comply with competition law. Despite the cardinal importance attributed to the protection of undistorted competition within the internal market, Article 165 of the Treaty on the Functioning of the EU (TFEU) clearly refers to the «*European dimension of sports*», recognising its «*specific nature*» and «*structures*» as well as the role of «*bodies responsible for sports*». Therefore, I advocate a holistic approach to the matter, that considers all the relevant EU law provisions and principles. The recognition of the so-called “European Sport Model” as inherent to the EU Treaties, and an assessment of the compatibility of the rules adopted by sports governing bodies in the light of the principle of proportionality, are the key tenets of such approach.

2. The European Sport Model and Article 165 TFEU

The *ESLC* case follows a request for a preliminary ruling from a Spanish court on a dispute opposing the European Super League against FIFA and UEFA.

The case touches upon the main principles characterising the European Sport Model: (i) a pyramid structure for the organisation of sport and sport competitions, in which sports federations play a central role, ensuring (among others) that national and international matches do not overlap^[8]; (ii) a system of open competitions based on the principle of promotion/relegation dependent on “on-pitch” performance, rather than on financial strength; (iii) solidarity between the various constituent elements and operators; and (iv) a professional and efficient governing system, where all stakeholders are represented (including the clubs and players), and which entails mechanisms to ensure impartiality and to avoid conflicts of interest^[9].

These features have been recognised in the Court’s case law over the years^[10], as well as in several EU soft-law instruments^[11].

With the adoption of the Lisbon Treaty, they were granted “constitutional status” by means of Article 165 TFEU^[12]. Pursuant to this provision, the EU shall not only recognise but also promote the European Sport Model. In particular, the Union shall foster «*fairness and openness in sporting competitions*».

3. Compatibility with EU competition law

It follows from the Court’s case-law since the judgment in *Walrave and Koch*, in the 1970s, that sport is subject to EU law, including the rules on competition (*Meca-Medina*), in so far as it constitutes an economic activity.

This means that the recognition of «*the specific nature of sport*»^[13] and the regulatory autonomy enjoyed by sports governing bodies do not remove sporting activities entirely from the scope of the Treaty^[14], even if these specificities will influence the assessment of the lawfulness of the practices or regulations at issue.

It is our understanding that this approach stems from a joint reading of Articles 101 and 102 TFEU, prohibiting certain forms of collusive behaviour and abuses of dominance, and Article 165 TFEU.

Once established that sporting rules are subject to EU law, it is then necessary to

determine the relevant framework of analysis that courts and administrative authorities, at EU or national level, must apply. Pursuant to the Court's consistent case-law (in sports cases but also in other fields), the application of Articles 101 and 102 TFEU requires an examination of all the relevant elements of the "economic and legal context" in which the practices have been adopted^[15]. The imperative to preserve the main features of the European Sport Model is certainly a relevant element to consider, as well as the strong countervailing market power that certain clubs and players that would be part of the European Super League enjoy.

4. The pre-authorisation requirement for competitions organised outside the scope of FIFA and UEFA

Concerning the specific issue of FIFA and UEFA rules requiring prior authorisation for the organisation of sporting events, at stake in the *ESLC* case, the key legal question seems to be whether the existence of a conflict of interests, alleged by the European Super League, would constitute *per se* a violation of EU competition law.

The potential for conflict of interests would arise from the fact that the governing bodies are simultaneously the rule makers of sports competitions (which includes the self-attributed power to pre-approve any competition organised by a third party) and the organisers of those competitions, thus exploiting the associated financial benefits.

In this regard, the Court has already clarified that the existence of a potential conflict of interests, due to the dual role an association of undertakings plays, does not automatically constitute a violation of competition law, provided its powers are subject to «*restrictions, obligations and review*»^[16]. These requirements imply that the rules enacted by the association be transparent, non-discriminatory and respect the principle of proportionality^[17].

This brings us to another point. Not only the application of competition law to sports must consider its specificities, but also the fundamental principles of that field of law, developed over decades in the Court's case-law, shall not be ignored just because sporting activities are at stake. In this respect, the Court has consistently held that the existence of a dominant position is not illegal under EU

law, provided that the undertaking concerned does not abuse it (see, among others, *Intel*). In the same vein, the dual role of sports governing bodies should not be deemed illegal, insofar as they establish sufficient safeguards to prevent the risk of abuses.

5. The Super League from an EU law standpoint

As stated, the main legal question at stake in the *ESLC* case revolves around the pre-authorisation requirement imposed by FIFA and UEFA and its compatibility with EU competition law.

Notwithstanding, this issue is inexorably linked to the question whether the creation of a “closed championship”^[18], such as the European Super League, would be consistent with EU law as it stands. As regards the principles and values enshrined in Article 165 TFEU, the very fact that it would mostly consist in a closed league runs counter the principles of promotion and relegation, as well as of the openness of competitions. Moreover, due to the high profile of the clubs that would participate in such league, the latter would risk holding a dominant position (depending on how the relevant market would be defined) and would possibly amount to a prohibited agreement between undertakings, laying ground for FIFA and UEFA successfully challenging it.

6. What to expect in the near future?

A Portuguese ex-football player once amusedly remarked that “predictions shall be left for the end of the match”. Differently, in EU law, where there is solid jurisprudence on a certain set of rules or practices, it is arguably less risky to estimate the probable outcome of a case.

To accommodate expectations, it is important to bear in mind the nature of the proceedings at stake. In the context of a reference for preliminary ruling, one should not expect seeing the Court going through every single aspect of FIFA and UEFA rules. In principle, only the specific questions concerning the interpretation of EU law submitted by the national court will be addressed so that the latter be subsequently able to solve the dispute at hand.

For this purpose, the principles characterising the European Sport Model must be considered, even more since, after the Lisbon Treaty, they expressly form part

of the Union's constitutional framework of which Article 165 TFEU is also part. In particular, the fact that sports governing bodies enjoy a high degree of autonomy, being better placed to regulate specific aspects of each sport, including the organisation of international competitions, seems unavoidable. Of course, that autonomy is not boundless. The need to self-impose certain limitations and to respect the requirements of proportionality must be present if an adequate equilibrium between the several interests at stake is to be preserved.

1. See e.g. Court of Justice, judgment of 12 December 1974, 36/74, *Walrave and Koch*, ECLI:EU:C:1974:140, concerning free movement of workers; Court of Justice, judgment of 18 July, C-519/04 P, *Meca-medina*, ECLI:EU:C:2006:492, regarding competition law. See also P. Ibáñez Colomo, *Competition law and sports governance: disentangling a complex relationship*, in *World Competition*, 45, 2022, p. 2, available at SSRN.
2. See e.g. T. Panja and R. Smith, *Europe's New Super League, Explained*, in *NYT*, May 2021.
3. The author represented Portugal in the oral hearing that took place in Luxembourg last July.
4. Request for a preliminary ruling from the Juzgado de lo Mercantil n.º 17 de Madrid (Spain) lodged on 27 May 2021, C-333/21, *European Super League Company*.
5. Appeal brought on 26 February 2021 by International Skating Union against the judgment of the General Court (Fourth Chamber, Extended Composition) delivered on 16 December 2020 in Case T-93/18, C-124/21 P, *International Skating Union v European Commission*
6. Request for a preliminary ruling from the Tribunal de première instance francophone de Bruxelles (Belgium) lodged on 11 November 2021, C-680/21, *Royal Antwerp Football Club*.
7. In June 2022, when the preliminary ruling proceedings were already pending before the Court, UEFA codified its rules regulating international matches (*Règles d'autorisation de l'UEFA régissant les compétitions interclubs internationales*).
8. At the bottom of the pyramid are the amateur, semi-professional and professional clubs. They are all members of the national federations for their particular sport. National federations organize competitions and regulate the sport at the national level and represent their branch at the European and international level. European and other regional confederations support and share the organization of sports with the world federation.
9. See Resolution 2021/C 501/01 of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 1° June 2011 on the key features of a European Sport Model. See also J. Sennett, A. Le Gall, G. Kelly, R. Cottrill, S. Goffredo and K. Spyridopoulos, *Study on the European Sport Model, a report to the European Commission*, April 2022.
10. See Court of Justice, judgment of 12 December 1974, 36/74, mentioned; Court of Justice,

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- judgment of 14 July 1976, 13/76, *Dona v Mantero*, ECLI:EU:C:1976:115; Court of Justice, judgment of 11 April 2000, C-191/97, *Delière*, ECLI:EU:C:2000:199; Court of Justice, judgment of 18 July, C-519/04 P, mentioned.
11. 1997 Amsterdam Declaration on Sport; Commission's 1999 Helsinki Report on Sport; 2000 Nice Declaration; European Parliament's 2007 Resolution on the future of professional football in Europe; 2007 Commission White Paper.
 12. Article 165 TFEU comes under Title XII of the Treaty on «*Education, vocational training, youth and sport*». Conversely, its predecessor in the EC Treaty, Article 149 TEC, referred only to «*education, vocational training and youth*», no reference being made to “sport”.
 13. See Court of Justice, judgment of 18 July, C-519/04 P, mentioned.
 14. See Court of Justice, judgment of 15 December 1995, C-415/93, *Bosman*, ECLI:EU:C:1995:463; Court of Justice, judgment of 11 April 2000, C-191/97, mentioned; Court of First Instance, judgment of 26 January 2005, T-193/02, *Piau*, ECLI:EU:T:2005:22; Court of Justice, judgment of 18 July, C-519/04 P, mentioned.
 15. See Court of Justice, judgment of 19 February 2002, C-309/99, *Wouters*, ECLI:EU:C:2002:98; Court of Justice, judgment of 18 July, C-519/04 P, mentioned; Court of Justice, judgment of 6 September 2017, C-413/14 P, *Intel*, ECLI:EU:C:2017:632.
 16. See Court of Justice, judgment of 1^o July, C-49/07, *MOTOE*, ECLI:EU:C:2008:376.
 17. See Court of Justice, judgment of 28 February 2013, C-1/12, *OTOE*, ECLI:EU:C:2013:127; General Court, judgment of 16 December 2020, T-93/18, *ISU*, ECLI:EU:T:2020:610.
 18. According to European Super League's *website*, the founding clubs would always have a guaranteed place. Five teams would qualify annually for the tournament.