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THE EUROPEAN SPORT MODEL: A MODEL TO DEFEND

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Abstract

The contradictory positions taken by the European institutions on the European Sport Model have demonstrated the difficulty of understanding such a model for decades. The existing conflicting situations show that the specificity of sport is struggling to play its role in protecting European sport. It, therefore, seems legitimate to ask the question of how to defend the European sport model, especially in the context of heterogeneous legislation and organisational models for sports within European countries. The aim of the article is, above all, to demonstrate that the European model emanates from a vision based on fundamental values that must take sport beyond the mere consideration of economic activity. As such, one of the challenges lies in maintaining the interactions between the different levels of the pyramid.

Keywords: Sports Law, Sports Economics, Sports Policy, Superleague Case, Closed Leagues

1. INTRODUCTION

The current organisational model of football is an illustration of the institutionalisation of European sport and originated in England at the end of the 19th century with the creation of bodies called clubs and associations. This organisation spread rapidly en route from India to the Commonwealth or via the various European ports, under the impetus of British commercial employees or engineers responsible for building the railways. At the beginning of the 20th century, this process of institutionalisation led to the emergence of what can be likened to a 'model' for the organisation of sport in Europe. A century later, although there is a degree of heterogeneity from one country or sport to another, certain pillars still seem to define the European sport model (ESM):

- The federations' monopoly;
- The regulatory power of federations;
- The affiliation of sportsmen and women to clubs and clubs to federations;
- The organisation of sport according to a pyramid system reinforced by the promotion/relegation phenomenon illustrates the porosity between the levels of the pyramid.

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This model is currently facing challenges, particularly in the face of the emergence of private commercial competition, at both, the top and the bottom of the pyramid, leading several actors within the sporting movement to question the model's sustainability.

In this context, two studies have been carried out in recent years, commissioned by actors from the sporting movement:
- a study on the emergence of closed leagues at the supranational level in Europe, carried out for the French Ministry of Sport, the French Basketball Federation, the Federation of Professional Coaches (FEP), and the Sports Economics Office of the French National Olympic Committee (CNOSF);
and
- a study on the European sport model, aimed at presenting the reasoning behind the defence of such a model, carried out for the CNOSF.[1]

These studies give us the opportunity to highlight a number of results by adopting both an economic and a legal approach. Thus, it is essential to realise that sport is not only a particular sector but also a singular economic good (I), two aspects which in our view justify an adapted application of European Union law (II).

2. THE UNIQUENESS OF SPORT AS A SECTOR OF ACTIVITY AND AN ECONOMIC GOOD

One of the conclusions of the above studies is that the ESM must be defended because of the particular nature of sport as an economic good. In our view, sport has the properties of a 'collective good' in that, in short, its positive impacts on health, citizenship, socialisation, etc. cannot be properly monetised.[2] As a result, economic theory predicts that firms in the private market sector would choose to offer a sub-optimal amount of sport, because they would only focus on its profitable aspects. Taking into account the multiple social impacts of sport requires broad, cross-cutting policies that cannot be implemented by private companies. In this respect, it seems that only public authorities can take on board the reasoning that the increase in expenditure incurred to increase physical activity will be offset by the expenditure avoided in other areas (health, social, security, etc.).

Having said that, it is important to emphasise the principles that underpin sport as a 'collective good':
- Solidarity: in particular the vertical solidarity between the top of the pyramid when it generates revenue and the bottom of the pyramid. For example, UEFA and the IOC already share more than 90% of the revenue generated.[3]
- Training: the ability to develop talent, which is a particularly costly medium to long-term investment.

1 Jean-François Brocard, and Marie Anglade, The European Model of Sport, Evaluation and Perspectives (Limoges: CDES, 2021), https://cdes.fr/wp-content/uploads/2023/02/v2_The-European-Model-of-Sport-VF.pdf.

2 Alain Beitone, "Biens publics, biens collectifs, Pour tenter d'en finir avec une confusion de vocabulaire," *Revue du MAUSS permanente* [online], https://www.journaldumauss.net/?Biens-publics-biens-collectifs.

3 UEFA, *The European Club Footballing Landscape 2020/21*, https://www.uefa.com/insideuefa/uefaeuropeanclubfootballinglandscape/

- Territorial coverage: sport must be available to everyone, regardless of social category, ability, or place of residence, so that it is an integral part of regional planning policies.
- Integrity: the integrity of the competition and the physical and mental integrity of the athletes are non-negotiable.

Identifying and analysing these fundamental principles is essential when considering the defence of the ESM, because alternative models have never proved that they can respect these principles. For example, European competition organisers from the private commercial sector, such as the ECA, organise supranational basketball competitions (the Euroleague and the EuroCup) without having implemented clear actions to ensure compliance with these principles. We could also mention that the North American professional leagues were often held up as examples to illustrate the fact that closed leagues would be the solution to all the problems encountered in Europe. The reality is, however, that the leagues, such as the NBA and the NFL, are profit-making organisations that do not share any of their revenues with grassroots sport. At best, they set up 'charity' operations that are far removed from what we in Europe would consider to be solidarity. Furthermore, these leagues only tackle integrity issues when they have potential implications for the revenue generated. We only have to look at the way they deal with issues of doping or sport betting to understand the highly opportunistic nature of actions 'supposedly' aimed at protecting the integrity of sport. Finally, taking advantage of the local university system or training efforts in other parts of the world, these leagues outsource the development of talent, which is in fact available either free of charge or at very low cost.

For a number of reasons, notably fiscal, legal and/or cultural, this closed league model cannot be directly imported into Europe. Furthermore, most attempts to organise closed club competitions at the supranational level in Europe have been economic failures, particularly for the clubs. It is important to remember that participation in the Euroleague is currently not profitable for any club, and some clubs have abysmal deficits.

UEFA and other competition organisers are currently being criticised for their lack of effort in setting up solidarity mechanisms or respecting sporting meritocracy. However, we should not forget that the current situation, while certainly open to criticism, is merely the result of the constant threats of a breakaway league made by the big clubs over the last 30 years in order to protect their own individual interests and increase their share of the revenue generated by UEFA, to the detriment of the smaller clubs and leagues. In a very interesting article published on 22 December 2022, three economists argue that this type of influence by the big clubs should be considered illegal.[4]

Sport is a unique economic good, but it is also a unique sector. By their very nature, athletes and clubs need competitors. The Coca-Cola Company would be delighted to have no competitors in the cola market. Yet, sport is different; competition is necessary. Furthermore, when athletes or clubs seek revenue, they not only need competitors, they need good competitors too, because they are working together to produce a common commercialised product: competition.

4 Tsjalle van der Burg, Hanno Beck, and Aloys Prinz, *Why the European Court of Justice should rule against the European Super League*, December 6, 2022, https://blogs.lse.ac.uk/europpblog/2022/12/06/why-the-european-court-of-justice-should-rule-against-the-european-super-league/.

Thus, even if sport is indeed an economic activity, its specificity justifies that it be reserved, if not specific treatment, at least an appropriate application of EU law, and in particular competition law.

3. THE NEED FOR EU LAW TO BE PROPERLY APPLIED TO SPORT

While it is now generally accepted by sporting bodies that the rules they draw up and, more broadly, their activities, must comply with the main principles of EU law, including - at the heart of the FIFA/UEFA vs 'Super League' dispute - the principle of free competition, it is equally generally accepted by EU bodies that the assessment of whether sporting bodies have breached these principles must take into account the specific characteristics of sport and its organisation in Europe.

The question is knowing where to find the balance that will allow the two legal systems, the 'European legal system' and the 'sports legal system', to coexist harmoniously, in the sole interest of preserving sport as a 'collective good'.

As a brief historical review will show, this point of balance is not easy to find, as the two systems have long 'sought' and 'gauged' each other since the creation of the European Economic Community. However, we believe that today, with the special place accorded to sport in the Treaty on the Functioning of the European Union (TFEU), and provided that the sporting bodies really grasp the importance of what is at stake, a harmonious coexistence between the two legal systems is possible.

For a very long time, sport lived in a kind of bubble in the belief that it was not subject to Community law because of its specificity, its history, its anteriority, and also its global dimension.

The first very hesitant encounter between the two legal systems took place in the 1970s with the Walrave (1974) and Doña (1976) judgments in which the Court of Justice of the European Communities (CJEC) (now the Court of Justice of the European Union (CJEU)) approached the encounter between Community law and sport solely from an economic point of view by considering that "*the practice of sport falls within the scope of Community law only insofar as it constitutes an economic activity within the meaning of Article 2 of the Treaty.*" The sporting movement then interpreted this distinction as a sporting exception in its favour, giving it the right to circumvent Community law.

Twenty years later, the Bosman ruling (1995) turned everything on its head and swung the pendulum in favour of the pure and simple application of European law to sport. It has to be said, that at the time, both FIFA and UEFA were 'oblivious' of the EU institutions. The Bosman ruling therefore put an end to what had previously been considered a sporting exception: for the first time, non-economic reasons were no longer sufficient to exempt sporting activity from Community rules.

The period following the Bosman ruling was marked by an extension of the scope of Community law, with sport gradually coming under competition law, culminating in the Meca-Medina ruling (2006) in which the CJEU decided that all sporting rules, including "purely"

sporting rules, were potentially open to action for hindering competition.

Despite the feeling of incomprehension that this ruling may have aroused at the time, it has to be noted that since then, not only have the European institutions recognised the concept of "specificity in sport" and largely contributed to defining its contours, but they have also fully integrated it into the decision-making process in sport litigation.

The high point in the recognition of the specific nature of sport by the EU institutions was undoubtedly the 2007 White Paper on Sport, in which the Commission defined the constituent elements, distinguishing in particular between the specific nature of sporting activities and that of sporting structures, and insisting on the fact that this specificity of sport must be taken into account by the case law of the European courts when they are called upon to carry out a proportionality review in order to verify whether the restrictions emanating from the rules of sporting organisations pursue a legitimate interest and are proportionate to the attainment of that interest. Another major step forward was taken in 2009, when the specific nature of sport was enshrined in the Constitution and incorporated into the TFEU Treaty. Article 165 of the TFEU expressly states 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.*" Thus, while sport is not above the law, it cannot be regarded as an ordinary economic activity. For Advocate General Rantos, Article 165 TFEU "*is intended to highlight the special social nature of this economic activity, which is capable of justifying different treatment in certain respects,*" and "*may serve as a standard for the interpretation and application of the provisions of competition law to the field of sport.*"[5]
However, by opting for a proportionality test - a test introduced in the Bosman judgment - to check whether a sporting rule is compatible with the fundamental freedoms of the EU or with European competition law, the court has chosen to highlight the specific nature of sport and to allow the sporting rule in question to evade European law if it complies with this proportionality test. As a reminder, this test is carried out in three stages: is the objective pursued by the offending rule legitimate? If yes, is the regulation adopted suitable for achieving this legitimate objective? And, if so, does it go beyond what is necessary to achieve that objective?

Legitimate objectives include, for example, the regularity of sporting competitions (Lethonen, 2000), the fair conduct, integrity and objectivity of sporting competitions (Meca-Medina, 2006), the recruitment and training of players (Bernard, 2010), the smooth running of competitions and the fact that the title of a champion is reserved for a national of the country (Biffi, 2019), or the protection of the integrity of a sporting discipline against the risks associated with betting, the fair running of competitions and the physical and moral integrity of athletes (ISU, 2020).

Even if this is a case-by-case analysis, which by definition does not make it possible to identify objective principles that would de facto apply to sporting rules, the recognition and use of the concept of the particular "nature of sport" by the European courts show that they are aware of the specificity of sport, its organisational model (a pyramidal organisation, interdependence between competitors, or the specificity of sport regulations), and therefore of the reasons

5 Opinion of the Advocate General in Case C-333/21, European Superleague Company: Press Release No 205/22 Luxembourg, 15 December 2022.

that justify the protection of the sporting movement. However, it is not a question of giving sporting institutions 'carte blanche.' By applying competition law to sport regulations, the aim of the Commission and the CJEU is to oblige sporting institutions to justify, explain, and discuss their regulatory powers in the interests of democratisation and openness.

4. CONCLUSION

The so-called 'Super League' case provides an opportunity to find the point of balance that will allow the two legal systems to coexist harmoniously and ensure the sustainable development of sport. However, it is all a question of balance: recognising and making full use of the specificity of sport enshrined in Article 165 of the TFEU implies, in return, an obligation on the part of the sporting movement to step up its efforts in terms of (i) governance, (ii) communication vis-à-vis the European institutions, and (iii) concrete actions demonstrating that the fundamental principles that characterise sport as a 'collective good' are taken into account.

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