

Sports Law, Policy & Diplomacy Journal



Vol. 2 / No. 1 (2024)





UNIVERSITY OF RIJEKA, FACULTY OF LAW
Institute of Sports Law, Sports Policies and Sports Diplomacy &
Jean Monnet Chair in EU Sports Law, Policy & Diplomacy

in partnership with



Sports Law, Policy & Diplomacy Journal

ISSN (Online) 2975-6235

UDC 3:796

DOI <https://doi.org/10.30925/slpdj>

Vol. 2

No. 1

Rijeka, 2024



**Co-funded by
the European Union**

'SPORTING MERIT' IN EUROPEAN UNION LAW

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UDC 347.4:796

061.1](4)EU

DOI <https://doi.org/10.30925/slpedj.2.1.5>

Received on July 10, 2024



Accepted on July 22, 2024

Original scientific paper

Abstract

'Sporting merit' played a central role in the judgments of the Court of Justice of the European Union (CJEU) in *European Super League Company* and *Royal Antwerp*. However, the concept has been undertheorised, and its role in the so-called 'European sport model' ('ESM') has been understudied. This article seeks to address this literature gap by understanding both the meaning and role of 'sporting merit' in EU law. It begins by analysing the Court's use of 'sporting merit' in its recent case law, arguing that the concept has become a cornerstone of the ESM. It then attempts to conceptualise 'sporting merit,' arguing that there are two possible ways to define this concept: a 'static' one, which prioritises the reward of immediate sporting achievements; and a 'dynamic' one, which places a greater emphasis on the promotion of long-term competitive balance. To understand the respective implications of these definitions, this article then explores how sporting merit is approached in both Europe and the USA. It argues that, whereas the ESM places a greater emphasis on the 'static' understanding of sporting merit, its North American counterpart embraces a 'dynamic' approach thereto, for example through financial redistribution and through sport-related corrective mechanisms such as draft systems. Building on the above, this article queries whether – and if so how – such corrective mechanisms could be incorporated into the ESM; whether doing so would lead to a more coherent approach to the promotion of 'sporting merit,' and whether it would be more in line with Article 165 TFEU.

Keywords: EU law, EU Sport Law, Sporting Merit, Competitive Balance, European Sport Model, North American Sport Model.

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1. INTRODUCTION

'Sporting merit' played a central role in recent judgments of the Court of Justice of the European Union (CJEU) in *European Super League Company* ('ESLC')¹ and *Royal Antwerp*.² However, the concept has been undertheorised, and its role in the so-called 'European Sport Model' ('ESM')³ has been understudied. This article seeks to address this literature gap by understanding the role played by 'sporting merit' in EU sport law. It will do so by focusing on football, Europe's most popular sport and that which has been the subject of the most recent judicial battles before the Court of Justice.

The article will begin by tracing the origins of 'sporting merit' in European Union (EU) sport law and policy. This will be done by reference to both the EU treaties and the various policy documents produced by the EU and by the Council of Europe (section 2). Having done so, it will explore the Court's case law, with a particular focus on *European Super League Company* and *Royal Antwerp* (section 3). It will build on this analysis to provide a working definition of sporting merit and to discuss the apparent tension between sporting merit and competitiveness, two seemingly contradictory objectives that any regulatory framework must balance (section 4). Having discussed the theoretical implications of this tension, the article will turn to the approach embraced by the 'North American sports model,' which will be contrasted with that embraced by European football (section 5). This will pave the way for the final section of this article, which will query what role sporting merit ought to play in EU sport law, what lessons – if any – can be learned from the North American approach, and whether any American concepts could be transplanted into ESM in a manner consistent with Article 165 TFEU (section 6). Section 7 will conclude.

By engaging in this discussion, the present article hopes to make a threefold contribution to the academic debate. First, it provides a descriptive understanding of the legal role of sporting merit in EU law, particularly in the wake of the recent judgments handed down by the Court of Justice. Second, it discusses the tension between competitive balance and sporting merit – one which has significant practical implications, but which has been undertheorised by the academic literature. Third, it engages in a comparative assessment with the so-called 'North American model,' understanding their relative strengths and weaknesses and querying what, if anything, EU law can learn from the latter.

1 Case C-333/21 *European Super League Company* EU:C:2023:1011 ('ESLC').

2 Case C-680/21 *Royal Antwerp Football Club* EU:C:2023:1010 ('*Royal Antwerp*').

3 The very existence of a single 'European sport model' – one which presents a set of characteristics which are common to all European sports – is controversial. This is particularly the case in relation to the requirements that competitions be open or that they embrace a 'pyramid structure,' which many sports and tournaments do not comply with. This article will not engage in an empirical analysis of the existence or otherwise of this model across the EU, nor will it explore its normative desirability. Instead, it will take the Court's case law at face value, accepting that a 'European sport model' plays a role in EU sport law and that sporting merit is deemed to constitute one of its key characteristics.

2. SPORTING MERIT IN EU LAW

2.1. THE TREATIES

In EU law, the principle of conferral establishes that the Union can only legislate where it is expressly authorized to do so by the treaties.⁴ Although sport-related disputes first reached the Court of Justice fifty years ago,⁵ sport policy was only expressly incorporated into the EU treaties through the Lisbon Treaty, which came into force in 2009.

EU sport policy is governed by Article 165 TFEU, which is located in Title XII of Part Three of the TFEU, titled 'Education, vocational training, youth and sport.' According to Article 165(1) (b) TFEU, "[t]he 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." This is further developed by Article 165(2)(g), which specifies that "Union action shall be aimed at ... developing *the European dimension in sport, by promoting fairness and openness in sporting competitions*."⁶ In order to contribute to the achievement of these objectives, Article 165(3) requires the Union and the Member States to "foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe." Article 165(4), on the other hand, allows the European Parliament and the Council, "acting in accordance with the ordinary legislative procedure," to "adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States." It also holds that the Council, on a proposal from the Commission, may 'adopt recommendations' on sport-related issues.

For the purposes of this article, two conclusions can be drawn from a purely textual analysis of Article 165 TFEU. The first such conclusion concerns the Union's capacity to regulate sport-related matters. As the Court of Justice clarified in both *ELSC* and *Royal Antwerp*, Article 165(4) allows the EU to engage in some sport-related rule-making, but cannot be relied on as a self-standing legal basis for the harmonisation of Union legislation.⁷ In the Court's own words, the Union has no general regulatory competence over sport, but merely a *supporting* one which allows it to pursue 'not a 'policy', as provided for by other provisions of the [TFEU], but an 'action' in a number of specific areas, including sport.'⁸

The second conclusion concerns what – if anything – the TFEU tells us about the meaning of 'sporting merit' in EU law. Although Article 165 TFEU does not refer to this concept, it does highlight three related ones. First, it refers to the 'specific nature of sport' – a highly contested notion, both legally and normatively.⁹ Second, it mandates the promotion of 'fairness ... in sporting competitions.' Third, it refers to the advancement of 'openness' in said competitions. As this article will argue, all three concepts can be interpreted in different ways, each with

4 Article 5(2) TFEU. The EU treaties are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which have equal legal weight.

5 Case 36/74 *Walrave and Koch* EU:C:1974:140.

6 Emphasis added.

7 *ESLC*, paras 99-100; *Royal Antwerp*, paras 67-68.

8 *ESLC*, paras 99-100; *Royal Antwerp*, paras 67-68.

9 Stephen Weatherill, "Fairness, Openness and the Specific Nature of Sport: Does the Lisbon Treaty Change EU Sports Law?," in *European Sports Law: Collected Papers*, ed. Stephen Weatherill (2nd edn., The Hague: Springer, The Hague, 2014), 527-541, 528.

significant implications for the operationalisation of sporting merit and, in turn, for the organisation and regulation of European sport. All three will therefore play a central role in the debate entertained in the following sections.

2.2. BEYOND THE TREATIES

The fact that sport did not feature in EU primary law prior to the Lisbon Treaty does not mean that there was no EU sport policy until 2009. For decades, there has been a relatively consistent effort to set out a European sport policy, both in the EU and within the framework of the Council of Europe. For reasons of space, the present section will not discuss all the instruments – ranging from ministerial conclusions to guidelines and from policy statements to reports – that refer to the regulation of sport in Europe.¹⁰ Instead, it will focus on those instruments which expressly refer to sporting merit or to the main characteristics of the European sport model. In doing so, it will seek to understand what – in anything – these documents tell us about the meaning of sporting merit in Union law.

The Commission's early sport-related policy documents contained no reference to sporting merit, nor did they expressly refer to a European sport model. The Communication on the European Community and sport,¹¹ published in 1991, did not mention either concept, nor was this notion addressed in the 1998 Staff Working Paper on 'the development and prospects for Community action in the field of sport' – a report which did, however, provide the first indications of what would later become the ESM, arguing that national competitions based on promotions and relegations constituted one of sport's 'unique characteristics.'¹² A similar silence characterised the Member States' most important sport-related statements: neither the Amsterdam Declaration, attached to the Amsterdam Treaty,¹³ nor the European Council's Nice Declaration, published in December 2000, made any specific references to sporting merit.¹⁴

Far more explicit was the so-called Helsinki Report, produced by the Commission in 1999.¹⁵ In its introduction, the Report points towards a European model of sport, arguing that there are "many common features in the ways in which sport is practised and organised in the Union, in spite of certain differences between the Member States," and suggesting that it

10 For a more extensive analysis, see Vivienne Halleux, *EU sport policy: An overview* (European Parliament Research Service, 2015) <https://www.europarl.europa.eu/EPRS/EPRS-IDA-565908-EU-sport-policy-overview-FINAL-28pages.pdf>, although note that the report does not refer to sporting merit.

11 European Commission, *The European community and Sport*. Communication from the Commission to the Council and the European Parliament SEC (91) 1438 final (1991) <http://aei.pitt.edu/3453/>.

12 European Commission, *Commission Staff Working Paper: The Development and Prospects for Community Action in the Field of Sport* (1998) https://ec.europa.eu/assets/eac/sport/library/documents/doc252_en.pdf, 6-7.

13 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Declarations adopted by the Conference – Declaration on sport [1997] OJ C340/136.

14 European Council, 2000 Nice Declaration, Annex IV, para 2, https://www.europarl.europa.eu/summits/nice2_en.htm.

15 European Commission, *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* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0644:FIN:EN:PDF>.

is “therefore possible to talk of a European approach to sport based on common concepts and principles.”¹⁶ Building on the above, it notes that the increasing commercialisation of sport, as well as the growing profits attached thereto, were putting at risk the “principle of financial solidarity between professional and amateur sport and the system of promotion and relegation common to most federations.”¹⁷ Once again, therefore, a European approach to sport is closely linked to the system of promotion of relegations which, the Report argues, ensures that competitions are premised on sporting merit. This is made even more explicit several pages later, where the Commission notes that “[t]he system of promotion and relegation is one of the characteristics of European sport” by “giving small or medium-sized clubs a better chance,” thereby “reward[ing] sporting merit.”¹⁸

Several years later, the Staff Working Document accompanying the highly influential 2007 White Paper on Sport once again referred to sporting merit. When discussing licensing systems for European football clubs, the Commission argues that:

“[l]icensing systems represent a compromise between the traditional openness of competitions in Europe, where access is allegedly based only on sporting merits, and the alternative approach of closed competitions in professional leagues, where the “financial” merit is preponderant. *Licensing systems thus represent an evolution of the so-called European approach to sport, where sport merit remains the main criterion for a club to be entitled to participate in often highly professionalized competitions [...]*”

In fact, it is from the White Paper onwards – a timeframe which coincides with the adoption of the Lisbon Treaty¹⁹ – that a shift in tone can be observed, both in the EU and in the Council of Europe. On the one hand, a 2008 resolution by the Parliamentary Assembly of the Council of Europe stressed “the need to preserve the European Sports Model,” a model which was “neither homogeneous nor perfect,” but was which was “deeply rooted in European civil society,” was “an important expression of European culture and the European attitude towards sporting values,” and was a “democratic model that serves to ensure sport remains open to everyone.”²⁰ Having set out the above, the PACE urged Member States to “uphold the European sports model based on the twin principles of financial solidarity and openness of competition (promotion and relegation, opportunity for all)” – a wording very similar to that set out in Article 165 TFEU.

In the EU context, a 2011 communication published by the Commission noted that “legitimate objectives pursued by sport organisations may relate, for example, to the fairness of sporting competitions [and] the uncertainty of results.”²¹ One year later, the European Parliament adopted a resolution which highlighted that:

16 The Helsinki Report on Sport, 3.

17 The Helsinki Report on Sport, 4.

18 The Helsinki Report on Sport, 10.

19 On the negotiations preceding Article 165 TFEU, see Borja García and Stephen Weatherill, “Engaging with the EU in order to minimize its impact: sport and the negotiation of the Treaty of Lisbon,” *Journal of European Public Policy* 19, no. 2 (2012): 238, <https://doi.org/10.1080/13501763.2011.609710>.

20 Parliamentary Assembly of the Council of Europe, Resolution 1602 (2008), ‘The need to preserve the European Sport Model,’ recital 2, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17628&lang=en>.

21 European Commission, Developing the European Dimension in Sport’ COM 2011 12 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0012:FIN:en:PDF>, 12.

“the European model of sport is based on a federation for each sports discipline, and whereas mechanisms for sports and financial solidarity, such as the principle of promotion and relegation and open competitions involving both clubs and national teams, are organised on an autonomous, democratic and territorial basis and in a pyramid structure, as the result of a longstanding democratic tradition.”²²

A similar conclusion was reached in 2017, where the Parliament argued that “the European organised sport model is based on the principles of territoriality and nationality, with one federation per discipline, and on solidarity mechanisms between elite and grassroots sports, as well as on promotion-relegation, open competitions and financial redistribution.”²³ In that same resolution, it reiterated “its attachment to the European organised sports models ... with open competitions and based on sporting merit.”²⁴

In 2021, only one year before the announcement of the breakaway European Super League, two relevant policy documents were published. The revised European Sports Chapter, adopted by the Council of Europe, noted that “[t]he organisation of top-level and professional sports competitions should be in compliance with the principle of openness in sporting competitions, giving priority to sporting merit.”²⁵ At the same time, the European Parliament referred to sporting merit as one of the key principles underlying the European sports model.²⁶ In its view, “open competition, sporting merit and fairness” were three of the principles which justified “strongly oppos[ing] breakaway competitions that undermine such principles and endanger the stability of the overall sports ecosystem.”²⁷

What can be gleaned from the policy documents reviewed above and how is it relevant to the question addressed in this article? First, both the Union and the Council of Europe acknowledge the existence of a ‘European sport model’ of sorts – in other words, of an approach to the organisation of European sports which, despite being ‘neither homogeneous nor perfect,’ boasts certain central characteristics. Second, the analysis carried out above shows how, over time, ‘sporting merit’ has gradually become one of the central characteristics underlying this model. Although the promotion of sporting merit plays an important role, it is not the only such characteristic that can be deduced from the above analysis: concepts such as the openness and fairness of sporting competitions, the system of promotions and relegations, and the principle of financial solidarity also feature in the policy documents explored in this section. Third, although these documents seem to agree that sporting merit plays a central role in the European approach to sport, none of them contain a definition of what sporting merit does or does not entail, nor do they set out how this concept can be operationalised:

22 European Parliament resolution of 2 February 2012 on the European dimension in sport (2011/2087(INI)) [2012] OJ C239E/46, recital AE.

23 (2016/2143(INI)) [2017] OJ C252/2, recital O.

24 European Parliament resolution of 2 February 2017 on an integrated approach to Sport Policy: good governance, accessibility and integrity, para 39.

25 Recommendation CM/Rec(2021)5 of the Committee of Ministers to member States on the Revised European Sports Charter (Adopted by the Committee of Ministers on 13 October 2021 at the 1414th meeting of the Ministers’ Deputies), para 14.3, <https://search.coe.int/cm?i=0900001680a42107>.

26 European Parliament resolution of 23 November 2021 on EU sports policy: assessment and possible ways forward (2021/2058(INI)) [2021] OJ C224/2, para 13.

27 European Parliament resolution of 23 November 2021 on EU sports policy: assessment and possible ways forward, para 13.

indeed, as will be set out below, the Court's recent case law has only partly clarified these questions. It is to this case law that this analysis will now turn.

3. SPORTING MERIT IN THE COURT'S CASE LAW

Although sport-related cases have been making their way to the Court of Justice for over five decades, 'sporting merit' did not feature in the Court's early case law. Instead, this concept was first mentioned in *Royal Antwerp* and *ESLC*, both of which were handed down, by the Grand Chamber, on 21 December 2023.

3.1. EUROPEAN SUPER LEAGUE COMPANY

'Sporting merit' was first raised by Advocate General ('AG') Rantos in *ESLC*, the dispute concerning the proposed breakaway league made up of twelve leading European football clubs. In his Opinion,²⁸ AG Rantos argued that the insertion of Article 165 TFEU through the Treaty of Lisbon had culminated the gradual process of constitutionalization that sport had undergone since the early days of Union law, a process which was encouraged by landmark judgments such as *Bosman*.²⁹ In his view, Article 165 not only confirmed that sport fell within the scope of Union law: it also afforded "constitutional recognition" to a "European Sport Model," a system "which is characterised by a series of elements applicable to a number of sporting disciplines on the European continent, including football."³⁰

Three such elements were identified, by the Advocate General, as characterising the ESM. First, "a pyramid structure with, at its base, amateur sport and, at its summit, professional sport." Second, *a system of open competitions based on sporting merit*. Third, a regime of financial solidarity, which allows profits to be redistributed to lower levels of the pyramid.³¹ When a court was faced with a case involving a sport-related dispute, AG Rantos argued, the dispute in question ought to be analysed in light of these special characteristics and of the "horizontal" nature of Article 165 TFEU,³² both of which should inform the Court's reading of the relevant provisions of EU law – for example, on competition law or free movement – raised by the dispute.

As is well known, the Court of Justice in *ESLC* shied away from affording sport the 'constitutional status' which AG Rantos advocated for.³³ Instead, the Court embraced what has long been

28 Case C-333/21, *European Super League Company*, EU:C:2022:993, Opinion of AG Rantos, para 30.

29 Case C-415/93, *Bosman*, EU:C:1995:463.

30 For an analysis of the Opinion, see Guillermo Íñiguez, "Constitutionalising European Football: AG Rantos' Opinion in *European Superleague Company* (C-333/21)," *EU Law Live*, December 16, 2022, <https://eulawlive.com/oped-constitutionalising-european-football-ag-rantos-opinion-in-european-superleague-company-c-333-21-by-guillermo-iniguez/>; Jan Zglinski, "Constitutionalising the European Sports Model: The opinion of Advocate General Rantos in the European Super League case," *EUROPP – European Politics and Policy*, December 16, 2022, <https://blogs.lse.ac.uk/europpblog/2022/12/16/constitutionalising-the-european-sports-model-the-opinion-of-advocate-general-rantos-in-the-european-super-league-case/>.

31 *Ibid.* On the 'European Sport Model,' see Floris de Witte and Jan Zglinski, "The Idea of Europe in Football," *European Law Open* 1, no. 2 (2022): 286, <https://doi.org/10.1017/elo.2022.15>.

32 *ESLC*, Opinion of AG Rantos, paras 34-41.

33 Guillermo Íñiguez, "European Super League Company and The (New) Law of European Football," *European Papers* 9, no. 1 (2024): 1, 8-10.

its orthodox approach to the interaction between EU law and sport: namely, that Union law affords no special status to sports law; that it is applicable to sport insofar as the latter “constitutes an economic activity,”³⁴ and that it is only “certain specific rules adopted solely on non-economic grounds and which relate to questions of interest solely to sporting per se” – for example, on national teams or raking criteria – that can fall outside the scope of the TFEU.³⁵ Having set the analytical scene, the *ESLC* judgment refers to sporting merit on three occasions. First, in its analysis under Article 102 TFEU, and more specifically when discussing the role of sport governing bodies (SGBs) in establishing prior approval rules for participation in breakaway competitions. In holding that the Treaties do not, in principle, preclude SGBs from setting such rules, the Court of Justice argues that this follows from the “considerable social and cultural importance” of football in the EU and from the former’s “specific characteristics”, including the importance of sporting merit in such competitions.³⁶ The concept is also relied on when addressing the application of Article 101 TFEU to the facts of the case. In this section of the judgment, the Court of Justice employs ‘sporting merit’ to tighten the scrutiny that SGBs must face when their rules on breakaway competitions are challenged before national courts. In essence, the Court of Justice holds that, although the referring court may take into account “the principles, values and rules of the game underpinning professional football, in particular the open, meritocratic nature of the competitions concerned,” simply referring to these objectives will not suffice to exempt UEFA and FIFA from Article 101(1) TFEU. On the contrary, the latter will have to show, on the basis of convincing evidence, that all requirements are actually satisfied on the facts.³⁷ Finally, sporting merit features in the Court’s analysis of the alleged restriction on the freedom to provide services, which is addressed at paragraphs 242-257 of the judgment. Having established that the UEFA-FIFA rules could amount to a violation of Article 56 TFEU, the Court notes that such restrictions ‘may be justified, in terms of its very principle, by public interest objectives consisting in ensuring, prior to the organisation of such competitions, that they will be organised in observance of the principles, values, and rules of the game underpinning professional football, *in particular the values of openness, merit and solidarity*.’³⁸

Based on the above, what role do sport’s ‘specific characteristics’ – including sporting merit – play in the analysis of sport-related cases? *ESLC* evidences that these characteristics will feature once two prior boxes have been ticked. To begin with, the applicant will have to establish that the case in question falls within the scope of EU law. Although this will often be an easy hurdle to clear, particularly given the Court’s growing insistence that sport enjoys no special status within EU law, it need not always be the case: as set out above, rules with no economic dimension, for example on the composition of national football teams, will not be caught by the treaties. On the other hand, the applicant will also have to identify a breach of Union law. Once these two elements have been established, ‘sporting merit’ will play a central

34 *Walrave and Koch*, para 4.

35 *ESLC*, see note 1 above, para 84. On the ‘purely sporting rule,’ see *Walrave and Koch*, see note 5 above, para 8, and *Bosman*, see note 29 above, paras 76 and 127. See also Stephen Weatherill, “The impact of the rulings of 21 December 2023 on the structure of EU sports law,” *International Sports Law Journal* 23, no. 4 (2023): 409, 414; Íñiguez, “*European Super League Company*”; and Jan Zgliniski, “Can EU competition law save sports governance?,” *International Sports Law Journal* 23, no. 4 (2023), 475, 476-478, <https://doi.org/10.1007/s40318-024-00258-9>.

36 *ESLC*, paras 144-145.

37 Íñiguez, “*European Super League Company*,” 11.

38 *ESLC*, see note 1 above, para 253 (emphasis added).

role at the two subsequent stages of the Court's analysis: first, when determining whether the breach of EU law can be justified, and second, when assessing whether any such justification is a proportionate means of achieving the proposed justification.

3.2. ROYAL ANTWERP

Sporting merit also features in *Royal Antwerp*, a judgment concerning the 'home-grown player' rules enacted by the Union of European Football Associations (UEFA) and the Belgian Football Association (URBFA).³⁹ *Royal Antwerp* and *ESLC* are highly cross-referential judgments. It is therefore not surprising that the Court's reasoning – and its analysis of the role of sporting merit – is very similar in both judgments. As in *ESLC*, sporting merit is once again listed as one of the "specific characteristics of professional football."⁴⁰ In the Court's own words:

"[The] specific characteristics [of European football] include the fact that it gives rise to the organisation of numerous competitions at both European and national levels, which involve the participation of very many clubs and also that of large numbers of players. In common with other sports, *it also limits participation in those competitions to teams which have achieved certain sporting results ...*, with the conduct of those competitions being based on matches between and gradual elimination of those teams. Consequently, *it is, essentially, based on sporting merit*, which can be guaranteed only if all the participating teams face each other in homogeneous regulatory and technical conditions, thereby ensuring a certain level of equal opportunity."⁴¹

In *Royal Antwerp*, therefore, sporting merit acquires an even greater relevance than in *ESLC*, becoming *the* central characteristic of European football; that which underpins the European sport model as a whole. Indeed, having set out its understanding of this model, the Court of Justice proceeds to draw on football's 'specific characteristics' to carry out its subsequent analysis concerning the categorisation of the restrictions in question as 'by object' or 'by effect.' When doing so, the Court relies on three factors: football's 'considerable social and cultural importance;' the fact that competitions are often organised nationally; and the centrality of 'sporting merit' to the organisation of those competitions,⁴² all of which have to be considered by the referring court in its analysis of the dispute before it.

3.3. DRAWING THE THREADS TOGETHER

Several provisional conclusions can be drawn from the analysis of the Court's case law. First, and in line with the analysis carried out in section 2, both *Royal Antwerp* and *ESLC* confirm that the promotion (and protection) of sporting merit is one of the 'specific characteristics' of the European Sport Model. Arguably, the Court's language denotes that it constitutes *the* central

39 For a more detailed commentary on the judgment, see Guillermo Íñiguez and Sergio Íñiguez, "A further piece in the football law jigsaw: *Royal Antwerp* (C-680/21)," *EU Law Live*, January 16, 2024, <https://eulawlive.com/op-ed-a-further-piece-in-the-football-law-jigsaw-royal-antwerp-c-680-21-by-guillermo-iniguez-and-sergio-iniguez/>.

40 *Royal Antwerp*, para 104.

41 *Royal Antwerp*, para 105 (emphasis added).

42 *Royal Antwerp*, paras 104-106.

characteristic of this model. Therefore, wherever a sport-related case reaches the Court of Justice, sporting merit is likely to play an important role in the latter's interpretation of the Treaty's competition or free movement provisions, although it is far from clear what type of evidence parties will have to adduce when invoking this concept before the Court.

Second, the Court of Justice makes it clear that the ESM is to enjoy no *sui generis* 'constitutional' role within the EU treaties. Contrary to what AG Rantos calls for in his Opinion, the ESM is not to be afforded a horizontal status which requires its characteristics to be taken into account by the EU legislator in all circumstances.⁴³ Nor do these specific characteristics allow SGBs to circumvent the treaties, for example by relying on sport's supposed autonomy to turn sport regulation into a *lex specialis* and escaping EU Courts' scrutiny.⁴⁴ However, although the Court of Justice shies away – or indeed, rebukes – the Advocate General's constitutional language, it does afford the 'specific characteristics' of European sport an important role in its interpretation of sport-related case law.

On the one hand, these specific characteristics, and hence sporting merit, can be used to identify objective justifications that parties may rely on when derogating from the EU treaties. This can be seen, for example, in the competition law analysis in *ESLC*, where the Court relies on both sport's specific characteristics – including sporting merit – when evaluating the legality of the UEFA-FIFA breakaway rules and when analysing the possible justifications of the joint sale of broadcasting rights.⁴⁵ On the other hand, sporting merit provides a factor which the Court can consider in its proportionality analysis, as *Royal Antwerp* evidences. As this author has previously argued, the Court of Justice embraces the approach of AG Szpunar in *Royal Antwerp*, taking into account the particular reality of football but stripping it of its constitutional fanfare. In other words, the Court of Justice adopts a nuanced – and orthodox – approach, whereby the peculiarities of sport neither enjoy a *carte blanche*, nor can they be disregarded by national courts. In that sense, sport is no different from other areas of the internal market, with Union law setting out an outer framework that cannot be derogated from whilst taking into account the economic reality of the sector in question.

4. THE TENSION: SPORTING MERIT VERSUS COMPETITIVE BALANCE

The preceding section has traced the Court of Justice's reliance on 'sporting merit' in its case law. Despite the Court's growing recourse to this concept, however, the latter has not yet been given a working definition. In other words, the Court's case law thus far tells us that sporting merit is important but does not tell us *what* this concept *means*. This is a fundamental weakness of EU sport law as it currently stands. After all, without a clear definition of this term, two parallel risks arise: first, that it is misapplied by the courts, both in the Member States and in Luxembourg; second, that its (mis)application by the latter cannot be properly analysed and critiqued.

At first sight, the meaning of sporting merit can be thought to be straightforward. After all, the idea that sporting events must be decided based solely on merit, and not on the basis of

43 *ESLC*, para 101.

44 As discussed in Stephen Weatherill, "Saving Football from Itself: Why and How to Re-Make EU Sports Law," *Cambridge Yearbook of European Legal Studies* 24 (2022): 4, <https://doi.org/10.1017/cel.2022.3>.

45 Íñiguez, "European Super League Company," 10.

unrelated considerations – such as the regulator’s preferred team, the government’s political preferences, or indeed because the result has been fixed in advance by participants – will seem obvious to most readers. This working definition, which this article will build on, reflects an intuitive link between ‘sporting merit’ and ‘fairness,’ a link which is best captured by the phrase “may the best team win.” For such sporting events to be ‘fair,’ clubs must be able to participate in sporting competitions under equal conditions, and rules and procedures must be designed to ensure that the best-performing team is able to win. Sporting merit, or merit-based sport competitions, can therefore be understood as an operationalization of ‘fairness’ in the context of sport, allowing an abstract concept to be transformed into detailed rules that can in turn govern the conduct of specific sporting events – or, indeed, the operation of a European model of sport.

However, a closer look at the concept of sporting merit reveals a picture that is more nuanced, and therefore less clear-cut and more diffuse. If sporting merit is indeed understood as a manifestation of ‘fairness’ – as a mechanism to promote fairness, but also a reflection of the latter in the context of sport governance –, it is suggested that there are two possible understandings of how sporting merit, and hence ‘fairness,’ can be encouraged. Both such definitions have distinct regulatory implications for European sport, and both are therefore worth addressing in turn.

The first possible understanding of sporting merit can be described as a ‘static’ one. The focus of the ‘static’ approach is on rewarding the most immediate manifestation of sporting merit: for example, by rewarding the winner of the most recent game or competition at hand. This operationalisation advances sporting merit in the intuitive, ‘static’ sense set out above, with a focus on promoting equality of *opportunity* among participating teams. At the same time, by rewarding the winner of openly competitive events, it can be thought to enhance ‘fairness’: provided that competitions are designed in a way that enables all participants to win and that punishes those who attempt to cheat, whoever emerges as the winner will have done so ‘fairly.’ Therefore, as well as promoting sporting merit, this definition also seems to fulfil the mandate – to promote ‘fairness and openness in sporting competitions’ – set out in Article 165(2)(g) TFEU.

The ‘static’ approach to sporting merit can be contrasted with a ‘dynamic’ one. As with the static framework, the ‘dynamic’ understanding of sporting merit will also ensure that the best-performing team wins. However, its approach will be more forward-looking. Instead of simply focusing on the most immediate tournament, it will understand that the promotion of sporting merit in a substantive manner requires a level playing field over time. Otherwise, in the context of team sports such as football, the static, ‘winner-take-all’ approach may give rise to growing sporting inequalities, with the winner reaping the financial rewards of its victory, using those rewards to strengthen its squad, and becoming increasingly dominant in the long run. In other words, the focus of the ‘dynamic’ approach lies on redistributing resources to ensure there is true competition on the merits *over time*, even if this requires moving away from a ‘pure’ merit-based approach.

The above discussion reflects a tension at the heart of the ESM. It will be recalled from Section 3 that the promotion of sporting merit is not the only characteristic highlighted by the Court of Justice. In *Royal Antwerp*, the Court notes that ‘sporting merit ... can be guaranteed only if all

the participating teams face each other in homogeneous regulatory and technical conditions, thereby ensuring a certain level of equal opportunity.⁴⁶ More generally, as set out above, the TFEU mandates that Union action be aimed at 'developing the European dimension in sport *by promoting fairness and openness in sporting competitions*.'⁴⁷ In other words, as well as promoting sporting merit, the ESM requires that the Union promote the *competitive balance* of its competitions. For present purposes, competitive balance can be understood as 'the overall balance of a sports league or championship, i.e. the competitive closeness of all participants in the contest.'⁴⁸

This apparent tension between the promotion of sporting merit and that of a competitive balance poses a dilemma for European sports law. By placing too heavy an emphasis on 'static' sporting merit, the ESM may inadvertently jeopardise the pursuit of a competitive balance, giving rise to more unequal competitions in which winners are rewarded and losing teams find themselves unable, in practice, to compete. This, in itself, may reduce the *uncertainty of outcome* characterising European sport, thereby leading to competitions which are less attractive for both fans and economic actors.⁴⁹ In other words, merely pursuing 'static' sporting merit may make 'dynamic' sporting merit more difficult to achieve, thereby resulting in competitions which are growingly unequal. In such a scenario, can it be said that sporting merit is truly being promoted, or does the latter require a playing field that is genuinely level? Conversely, although prioritizing competitive balance at the expense of sporting merit may result in 'fairer' competitions, it may in turn require sport-related corrective mechanisms which are alien to the cultural dimension of European sport.⁵⁰ Insofar as this is the case, it can be queried whether competitions which focused exclusively on the pursuit of a competitive balance at the expense of 'sporting merit' could be compatible with EU sport law.

How this tension is resolved is not merely of theoretical interest. Instead, it will have important practical implications, and may in turn result in radically different sporting outcomes. To illustrate these difficulties, let us focus on one of the cornerstones of the European sport model: namely, the system of promotions and relegations upon which the pyramid structure is based. To many, this system is the archetype of merit-based competition. At the end of any given season, the worst-performing teams will be relegated to a lower tier, whereas the best-performing ones in the lower tiers will be promoted to a higher one. At the same time, these systems will also draw a direct link between a team's end-of-season ranking and the financial reward they obtain for their performance, with higher-ranked clubs obtaining

46 *Royal Antwerp*, para 105.

47 Article 165(2)(g) TFEU (emphasis added). On 'fairness' and 'openness' in European sports law, see Weatherill, "Fairness, Openness and the Specific Nature of Sport," 536-538.

48 See Oliver Budzinski and Tim Pawlowski, "The behavioural economics of competitive balance: Implications for league policy and championship management," Ilmenau Economics Discussion Papers No. 89 (2014), 2. For an interesting statistical analysis, see Michael J Lopez, Gregory J Matthews and Benjamin S Baumer, "How Often Does the Best Team Win? A Unified Approach to Understanding Randomness in North American Sport," *The Annals of Applied Statistics* 12, no. 4 (December 2018): 2483, <https://doi.org/10.1214/18-AOAS1165>. See also Kevin Alwell, "Analyzing Competitive Balance in Professional Sport" (Honors scholar thesis, University of Connecticut, 2020).

49 On which, see Tsjalle van der Burg, "Why transfer fee systems improve market competition, and why the Bosman ruling was flawed" *International Sports Law Journal* (2024): 1, <https://doi.org/10.1007/s40318-024-00271-y>; and Loek Groot, *Economics, Uncertainty and European Football: Trends in Competitive Balance* (Cheltenham: Edward Elgar, 2018).

50 On which, see De Witte and Zglinski, "The Idea of Europe in Football," 287.

significantly higher payouts than lower-ranked teams.

This system, which rewards immediate sporting success, can be thought to advance a 'static' understanding of sporting merit. At first sight, several arguments can be advanced in favour of this approach. First, it provides an immediate incentive for teams to perform well: after all, whoever does so will have access to higher financial rewards, and will thereby be able to purchase better players and access more exciting competitions. Second, by drawing a link between a team's league position and their financial reward, such a system rewards merit in a way that directly corresponds to their sporting performance. In other words, this framework sits as closely to the "may the best team win (and benefit from their victory)" mantra as can be. The above considerations help to explain why the promotion and relegation system is seen as a cornerstone of the European sport model.⁵¹

However, this ideal model also evidences the limitations of a static understanding of sporting merit. Although this 'static' framework may be thought to reward the best-performing teams, its close relationship with financial income can give rise to a perverse situation. In order to address this, let us focus, once again, on football and on the domestic league structure. In any such league, teams wishing to perform well will have to access football's most valuable resource: players. In turn, for these players to be signed, they will need football's second most valuable resource: money.

Let us imagine that Team A wins its domestic league, and therefore receives a significant financial reward, both directly (from its performance throughout the season) and indirectly (from the associated broadcasting rights and through its qualification for the UEFA Champions League). In the following transfer window, Team A therefore has access to a significantly larger budget than its counterparts, and is thus able to sign three of the world's most promising young players, which until this transfer window played in middle-ranking teams in the same domestic league. Team A therefore significantly improves the quality of its squad, whereas three of its domestic rivals miss out on its star players. The following season ends with Team A winning yet another championship, which in turn gives rise to another significant financial reward, therefore allowing Team A, once again, to sign star players. Hypothetically, this can lead to a never-ending cycle of greater income and better players; one which can hardly be thought to be in line with the European Sport Model, whether in its 'affective' dimension or, indeed, in its 'governance' one.⁵²

Far from constituting a mere theoretical exercise, the above thought experiment reflects the present reality of European football, where competitive balance has noticeably decreased over the years.⁵³ In Europe's top five leagues (Spain, England, Germany, France, and Italy), it has become increasingly possible to predict who will be the winner even before the season has started. In the period spanning the seasons 2013/14 to 2022/23,⁵⁴ Paris Saint-Germain have won eight French leagues; Manchester City, six English Premier Leagues; Real Madrid and FC Barcelona, a combined Spanish eight; Juventus, seven Italian leagues; and Bayern

51 That the pyramid system constitutes a cornerstone of the ESM has been widely acknowledged by the literature. See among others Íñiguez, "European Super League Company," De Witte and Zglinski, "The Idea of Europe in Football", and Weatherill, "Saving Football from Itself."

52 On which, see De Witte and Zglinski, "The Idea of Europe in Football."

53 On which, see Van der Burg, "Why transfer fee systems improve market competition."

54 2013/2014 to 2022/2023.

Munich, all ten German *Bundesliga* titles. Although much of this dominance can be linked to the distribution of income from broadcasting rights, a broader debate concerning the pyramid structure can also be raised. After all, it is far from clear whether this structure is truly meritocratic, enabling any club to reach the top tier, or whether, by limiting the number of teams that can be promoted in any given season, it simply entrenches existing hierarchies, benefitting a competition's founding clubs and rendering it almost impossible for clubs at lower steps of the pyramid to access the top divisions. Beyond the domestic context, a similar phenomenon has played out in the UEFA-organised Champions League, which has witnessed a growing dominance by a select few teams which has, itself, contributed to a decline in the tournament's competitive balance.⁵⁵ This is best illustrated by the fact that, in the entire 21st century, only one team from outside the top five leagues – FC Porto, in the 2003/04 season – has won the tournament.

Building on this example, it is therefore suggested that there is an inherent tension between the promotion of sporting merit and that of a competitive balance: in other words, a model which places an excessive emphasis on 'static' sporting merit may be unable to ensure that sporting competitions remain competitive over time. This, it is argued, is a central flaw of the European sport model as it stands. Given that the promotion of 'sporting merit' is not the only characteristic of the ESM, and must instead be reconciled with other considerations – such as the promotion of fair and open competitions or a system of financial solidarity –, it is suggested that a model which struck a more balanced approach would be more closely aligned with the European sport model. The following section will explore how the ESM can reconcile these seemingly mutually exclusive goals. It will do so by reference to the so-called North American sport model, which approaches this tension in a somewhat different manner to the European one.

5. A COMPARATIVE APPROACH: HOW DOES THE USA PROMOTE 'SPORTING MERIT'?

5.1. UNDERSTANDING THE AMERICAN SPORT MODEL

So far, this article has focused on the central features characterising the so-called 'European Sport Model,' with a particular focus on the Court's case law and on the theoretical and practical tensions that sporting merit may give rise to within that European model. The present section will embrace a comparative approach, focusing on the so-called 'North American' model of sport. When referring to the 'North American' model, this article will focus on the economic and sporting structure governing the four most important US leagues: the National Basketball Association (NBA), the National Football League (NFL), the Major League Baseball (MLB), and the National Hockey League (NHL). Other leagues, such as the Major League Soccer (MLS), are organized according to a different model, and will therefore be disregarded for the purposes of this article.⁵⁶

55 Miguel Poiães Maduro, "Can EU law save European football?", *Europa Felix*, May 25, 2023, <https://www.europafelix.eu/2027039/12801132>.

56 On the MLS, see Todd Jewell, "Major league soccer in the USA", in *Handbook on the Economics of Professional Football*, eds. John Goddard and Peter Sloane (Cheltenham: Edward Elgar, 2014), 351-367.

The differences between the European and American sport models concern both their respective goals and the manner in which those objectives are pursued. Some of these differences were set out, albeit very cursorily, by Advocate General Rantos in his Opinion in *ESLC*. In his view, the European model “differs from the North American model, which is primarily based on ‘closed’ competitions or leagues, in which the participation of clubs, which are franchised businesses, is guaranteed, pre-determined and based on an entrance fee.”⁵⁷ In fact, for AG Rantos, the differences between these approaches are not merely coincidental, nor are they the result of a historical accident. In his words, “it is precisely in response to the other models which exist that the EU legislature decided to incorporate the concept of the ‘European Sports Model’ into the Treaty in order to draw a clear distinction between it and those other models and to guarantee its protection through the adoption of Article 165 TFEU.”⁵⁸ In essence, the Advocate General seems to suggest that the differences between both approaches are existential, in that the European sport model exists to protect itself from the American one.

To begin with, the Big Four American leagues are closed, with a horizontal structure and no system of promotions and relegations. In other words, the ‘pyramid’ structure that characterizes European sport is nowhere to be found in the American system.⁵⁹ The stability in the composition of North American leagues gives rise to a business model that is radically different to the European one. Regarding clubs, “the certainty of remaining in the highest level of a given league provides incentives for [them] to promote and grow their brands” – for example, by allowing “existing team owners to use the scarcity of teams to pressure municipalities into building their teams publicly funded facilities and has allowed them to sell expansion teams at uniquely expensive prices.”⁶⁰ At the same time, the quasi-permanent nature of the leagues themselves has facilitated long-term agreements between franchises on matters such as intellectual property rights or the centralized sale of betting data.⁶¹ This greater collective focus, which has also allowed leagues to focus on generating revenue in order to attract top talent *to the league as a whole*, rather than to individual clubs at the expense of others, is facilitated by the suspension of traditional US antitrust and labour laws in relation to sports.⁶²

Second, the North American model is characterised by greater self-regulation, with very limited public intervention from the federal government and the understanding that leagues

57 *ESLC*, Opinion of AG Rantos, para 33.

58 *ESLC*, Opinion of AG Rantos, para 33.

59 Although the structure of some European leagues, such as the Euroleague Basketball, increasingly resembles the North American format.

60 Marc Edelman, “European Super League Will Bring the Lucrative U.S. Sports Model Overseas,” *Forbes*, April 19, 2021, <https://www.forbes.com/sites/marcedelman/2021/04/19/european-super-league-brings-lucrative-us-sports-model-overseas/?sh=549587150b17>.

61 *Ibid.* On data-sharing agreements, see also Marc Edelman and JT Holden, “Monopolising Sports Data,” *William & Mary Law Review* 63, no. 1 (2021-2022): 69, <https://scholarship.law.wm.edu/wmlr/vol63/iss1/3>.

62 See 15 U.S.C. § 1291 (2022), which ‘exempt[s] from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues’, although note, more generally, 15 U.S.C. § 1294 (2022), which limits the scope of the exemption set out at § 1291. For a detailed analysis, see Leah Farzin, “On the Antitrust Exemption for Professional Sports in the United States and Europe,” *Jeffrey S. Moorad Sports Law Journal* 22, no. 1 (2015): 75. This approach is worth contrasting with that embraced by the Court of Justice of the European Union, which (arguably) treats sport clubs as ‘ordinary’ businesses for the purposes of EU competition law and the free movement provisions.

and franchises are best left to their own devices. This stands in clear contrast to Europe, where there is a greater public dimension to sport – as exemplified by national sports federations, which are often quasi-public bodies – and where the European Union has become increasingly involved in recent years.

Third, and most importantly for present purposes, the American model also includes sport-related corrective mechanisms – in other words, mechanisms aimed at correcting inequality between teams and promoting the competitive balance of domestic leagues.⁶³ Two such mechanisms stand out. On the one hand, salary caps, which limit the money franchises can spend on their players' salaries and which have been shown to produce "more balanced league[s]."⁶⁴ On the other, so-called 'draft systems,' which allow the worst-performing teams in any given season to access the most sought-after young players, therefore providing them with an opportunity to rebuild their squads whilst limiting top-performing teams' ability to access this young talent. Collectively, these systems ensure that competitions remain competitive over time, and that performing well is a *real* possibility, not just a fiction, for all participating teams.

As Van Bottenburg suggests, the differences between the European and North American sports models result from their distinct historical roots. In his words, "[i]n the nineteenth and twentieth century, the European and American sports formations and cultures developed along quite different paths," both in relation to which sports became popular; the contexts in which they were first practised; and how they were commercialized and organized.⁶⁵ More broadly, however, the European and American sports models are also reflective of the broader cultural, political, and ideological differences underlying European and American societies. These differences transcend the context of sport, but also unequivocally shape how the latter is organised. The fact that sport is organized "independently of the state"⁶⁶ – that it is market-driven, with government regulation viewed as unthinkable – is reflective of a broader American model of regulation which Anu Bradford has explored at length in her work on technological regulation.⁶⁷ Conversely, the European model – one which views regulation as a more acceptable means through which to achieve 'fair' competition – is closer to the European model of regulation in other areas, not least the ordoliberal influence on the Union's

63 For a comparative analysis of the relative competitive balance of 'open' European football leagues and of 'closed' American leagues, see Loek Groot, "Competitive Balance in Team Sports: The Scoring Context, Referees, and Overtime," *Journal of Institutional and Theoretical Economics* 165, no. 3 (2009): 384, <https://doi.org/10.1628/093245609789471961>.

64 See Helmut M Dietl, Egon Franck, Markus Lang and Alexander Rathke, "Salary cap regulation in professional team sports," *Contemporary Economic Policy* 30, no. 3 (2012): 307, <https://doi.org/10.1111/j.1465-7287.2011.00265.x>, although the effectiveness of salary caps is questioned by Stefan Késenne, "The Impact of Salary Caps in Professional Team Sports," *Scottish Journal of Political Economy* 47, no. 4 (2000): 422, <https://doi.org/10.1111/1467-9485.00171>.

65 Maarten van Bottenburg, "Why are the European and American sports worlds so different? Path dependence in the European and American sports history," in *Sport and the Transformation of Modern Europe: States, media and markets 1950-2010*, eds. Alan Tomlinson, Christopher Young and Richard Holt R (Abingdon: Routledge, Abingdon, 2011), 205-225.

66 van Bottenburg, "Why are the European and American sports worlds so different? Path dependence in the European and American sports history," 205.

67 See Anu Bradford, *Digital Empires* (Oxford: Oxford University Press, 2023); and Anu Bradford, "The False Choice Between Digital Regulation and Innovation," *Northwestern University Law Review* 118, no. 2 (October 2024) (forthcoming).

competition law framework⁶⁸ or its hands-on approach to the regulation of “digital empires.”⁶⁹

5.2. SPORTING MERIT AND COMPETITIVE BALANCE UNDER THE AMERICAN SPORT MODEL

How, then, does the American sports model understand the tension between sporting merit and competitive balance? Building on the framework set out above, the present article suggests that, whereas the European sport model tends to endorse a ‘static’ view of sporting merit, the American model emphasises a ‘dynamic’ one: in other words, it places a greater emphasis on maintaining a competitive balance *over time*, even if this requires greater *ex ante* intervention by domestic leagues in order to redistribute the sport’s most important resources. This can be observed, on the one hand, from the agreements struck between franchises to enable the pooling of financial resources – such as the income obtained from the joint sale of broadcasting rights – which are jointly exploited by leagues and subsequently redistributed to enhance the latter’s value. No less importantly, the emphasis on promoting a competitive balance can also be deduced from the presence of sport-related corrective mechanisms, such as salary caps or the draft system.

By prioritising the pursuit of a long-term competitive balance over that of short-term sporting merit, the North American sport model facilitates sport-related turnovers that are almost unthinkable in Europe. In the NBA, for example, an intelligent use of draft picks allowed the Boston Celtics, one of the worst-ranked teams in the 2006/07 season, to win the title the following season.⁷⁰ It also enabled the Golden State Warriors, a consistently mid-ranking team for many years, to create a hegemonic dynasty in the space of a few years. Similar examples can be found in other sports. In the NFL, the New England Patriots went from an underwhelming 2000-2001 season, with 5 victories and 11 defeats, to a highly successful 2001-2002 one, in which they topped their division and went on to win the Super Bowl. This turnaround was largely facilitated by the performance of their draft pick Tom Brady, a largely unknown player who had been signed by the Patriots two years earlier. Although European football underdogs have carried out historic upsets in recent years – with Leicester’s 2015-16 Premier League win or Atlético de Madrid’s 2013-14 La Liga triumph providing perhaps the most remarkable examples – these are largely historical accidents, rather than the product of structural corrective mechanisms designed to ensure that competitive balance is upheld over time. In the Premier League, Leicester City’s win proved a one-off phenomenon; in Spain’s La Liga, Atlético’s two recent league titles have proved a mere drop in a 19-year ocean of Real Madrid and FC Barcelona dominance. Nor did Lille OSC’s victory in the 2020-2021 Ligue 1 prevent eight PSG league titles in the last ten years.

None of the above, of course, means that the North American model does away with sporting merit in the organisation of its major leagues. However, as the previous examples illustrate, the approach embraced by these leagues does strike a better balance between the reward of

68 On which, see Elias Deutscher and Stavros Makris, “Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus,” *The Competition Law Review* 11, no. 2 (2016): 181,

69 Bradford, *Digital Empires*, and Bradford, “The False Choice Between Digital Regulation and Innovation,”

70 Yash Matange, “Five best single-season turnarounds in NBA history,” *The Sporting News*, May 5, 2021, <https://www.sportingnews.com/ca/nba/news/5-best-single-season-turnarounds-boston-celtics-2008-san-antonio-spurs-phoenix-suns/1q7z8kfmeqjs61hp0lr43rzd35>.

short-term sporting merit and the pursuit of long-term competitive balance, ensuring that its leagues are won by a wider range of clubs. In the ten seasons spanning the years 2013/14 to 2022/23, the NBA has been won by eight different franchises;⁷¹ the NFL, by seven;⁷² the MLB World Series, by nine;⁷³ and the NHL, by eight.⁷⁴ Collectively, therefore, 34 franchises have won the Big Four US leagues, whereas only fifteen clubs⁷⁵ have won the five most important European football leagues.

Similarly, the above does not imply that the North American sports model is perfect or that Europe should transplant every single of the model's features within its own framework. As von Bottenburg's analysis highlights, both models are deep-rooted in their respective social, political, and cultural systems. Indeed, the pyramid structure which characterises many – albeit not all – European sports can be thought to belong to the “affective” dimension of the European Sports Model, as the fallout from the *Superleague* saga illustrated.⁷⁶ However, the analysis undertaken in this article does suggest that Europe would do well in learning from the American model to promote greater competitive balance in its sporting competitions.

5.3. WHAT CAN THE EU LEARN FROM THE US?

Many of the financial corrective measures promoted in the US would be almost impossible to implement in the European Union. To name but one example, the centralisation of financial, intellectual property, or data resources which characterises the North American model would most likely be incompatible with Article 101 TFEU, since EU law does not exempt sport clubs from the EU competition *acquis* in the same way that US law does. Nor is it obvious, for similar reasons, that salary caps or other labour-related measures could survive the Court's scrutiny. This could only be the case if they were deemed to fall within the 'purely sporting rule' discussed above – an avenue that has become significantly narrower following the December judgments.⁷⁷ However, this is not to say that *sport*-related corrective measures could not be envisaged. This is particularly the case in relation to the draft system, which “reflects the deeper commitment of North American sports leagues to managing competitive equality and uncertainty of results.”⁷⁸

71 Denver Nuggets, Golden State Warriors, Milwaukee Bucks, Los Angeles Lakers, Toronto Raptors, Cleveland Cavaliers, San Antonio Spurs.

72 New England Patriots, Denver Broncos, Philadelphia Eagles, Kansas City Chiefs, Tampa Bay Buccaneers, Los Angeles Rams.

73 Texas Rangers, Houston Astros, Atlanta Braves, Los Angeles Dodgers, Washington Nationals, Boston Red Sox, Chicago Cubs, Kansas City Royals, San Francisco Giants.

74 Vegas Golden Knights, Colorado Avalanche, Tampa Bay Lightning, St Louis Blues, Washington Capitals, Pittsburgh Penguins, Los Angeles Kings, Chicago Blackhawks.

75 Leicester City FC, Chelsea FC, Manchester City FC, Liverpool FC; FC Barcelona, Real Madrid CF; Club Atlético de Madrid; FC Bayern Munich; Paris Saint-Germain FC, Lille OSC, AS Monaco FC; Juventus FC, AC Milan, FC Internazionale Milan, SSC Napoli.

76 On the 'affective' dimension of European sport, see D Witte and Zgliniski, “The Idea of Europe in Football.”

77 On which, see the literature cited in footnote 35, above. See also Stephen Weatherill, “Protecting the conditional autonomy of governing bodies in sport from review ‘from a competition standpoint’: how the Court should decide its pending cases on the transfer system, the regulation of agents and club (re-)location,” *EU Law Analysis*, May 11, 2024, <http://eulawanalysis.blogspot.com/2024/05/protecting-conditional-autonomy-of.html>.

78 Weatherill, “Resisting the Pressures of ‘Americanization’: The Influence of European Community Law on the ‘European Sport Model’”, in Stephen Weatherill, *European Sports Law: Collected Papers* (2nd edn., The Hague: Springer), 177-200, 190.

Draft-related rules would be unlikely to fall foul of the EU treaties. On the one hand, they do not concern EU's economic rules and could therefore be argued to fall outside the scope of EU law in the first place. It is worth recalling that, in *ESLC*, the Court of Justice reiterated that "specific rules adopted solely on non-economic grounds and which relate to questions of interest solely to sporting per se," such as those that determine the ranking criteria used to select athletes or clubs participating in competitions, fall outside the scope of EU law.⁷⁹ Arguably, a draft system – in other words, a framework designed to assign players to clubs participating in a league based on their past performance – would be caught by this *dictum* and thus be exempt from the scrutiny of EU law.

However, even if this rule were deemed to fall within the scope of Union law, it is easy to envisage how, drawing on the argument put forward throughout this article, they could be justified by reference to Article 165 TFEU. Indeed, although draft-like mechanisms are "culturally ... alien" to European sport *as it stands*,⁸⁰ it is suggested that these self-correcting mechanisms not only reflect the particular values projected by American sports: but they may also be better suited to promote the very objectives that the *European* sports model sets out to achieve. After all, it must be recalled that Article 165 TFEU calls for the promotion of "*fairness and openness in sporting competitions*." If, as this article argues, the promotion of a competitive balance must form part of this quest for 'fairness' and 'openness' by ensuring that European sporting competitions are open to a wider range of participants; and if sport-related corrective mechanisms contribute to the attainment of long-term competitive balance within these competitions, there is nothing in the European sport model, and hence in EU law, that precludes the adoption of such mechanisms. Indeed, the introduction of sport-related corrective mechanisms could complement existing mechanisms, such as those designed to facilitate the redistribution of broadcasting rights, which have shown themselves unable to remedy the growing inequality underlying European football.

5. CONCLUSION

This article has explored the doctrinal and normative role of sporting merit in European sport, with a particular focus on football. It has first traced the origins of the concept in the EU treaties and in different soft-law instruments produced by both the European Union and the Council of Europe. Although both institutions have acknowledged the existence of a European approach to sport, which is comprised of several characteristics including the promotion of sporting merit, none of the aforementioned instruments attempt to define the concept. It has then explored the growing role that the concept has acquired in the case law of the CJEU, with a particular focus on the recent judgments in *ESLC* and in *Royal Antwerp*, where sporting merit has arguably become *the* central characteristic of the European sport model.

Building on this descriptive analysis, this article has engaged in a normative evaluation of the concept. After providing a working definition of the concept, it has highlighted the tension between sporting merit and the promotion of competitive balance, two objectives that reflect different goals mandated by Article 165 TFEU ('fairness' vs. 'openness'). This has paved the way for a comparative analysis of the role of both sporting merit and the pursuit of a

⁷⁹ *ESLC*, para 84.

⁸⁰ Weatherill, "Resisting the Pressures of 'Americanization,'" 190.

competitive balance in North American sport. It has been argued that, despite being anathema to the values supposedly espoused by the European Sport Model, many of the self-correcting instruments relied on in American sport, such as the draft system, may in fact be better at advancing these values. Although seemingly at the expense of sporting merit – for example, by rewarding the worst-performing teams with the best draft picks, thereby allowing them to access the most talented young players of the time – these mechanisms may result in greater competitive balance over time, allowing clubs to build high-performing teams over a period of time and giving rise to a bigger pool of potential competitors.

Having set out the above, it is worth reflecting on the lessons which this article can teach us. To begin with, the Court's recent case law evidences that the promotion of sporting merit is likely to become one of the key characteristics – if not *the* key characteristic – of the European sport model, and therefore to play a growing role in the future cases making their way to the Court of Justice. Given the above, it is therefore necessary to define this concept, and to consider the role which it ought to play in EU sport law. As this article has suggested, this will require regulators to make a choice between two possible approaches: one predominantly premised upon the promotion of short-term sporting merit and another which prioritises the pursuit of long-term competitive balance. Both avenues have significant practical implications. Opting for the former may feel like the more natural expression of 'fairness,' but may simultaneously enhance inequalities over time, thereby diminishing the 'fairness' and 'openness' of European sport. Conversely, opting for more radical redistributive mechanisms may feel hard to reconcile with the 'affective' dimension of European sport, but may arguably be better at pursuing the objectives set out in Article 165 TFEU. A third likelier avenue – one which opted for a balance between both approaches – would perhaps be best at addressing this tension but would raise questions, requiring the EU to establish a hierarchy between both objectives.

Whatever the model embraced by the Union, several issues will have to be addressed. To begin with, the question arises of whose job is it to define what 'sporting merit' should – and should not – entail. Is this a question that should be left to SGBs themselves, with little, if any, EU scrutiny? Conversely, if the Union steps in, are these questions that the Court of Justice, as a 'negative legislator,' should be left to answer, or should the EU legislator step in? Is the definition of 'sporting merit' a question pertaining to the *substance* of sport, or does it relate to the *structure* of how the sport is organised? Does this distinction matter when deciding whether the EU is legitimised to step in? Finally, can a European sport model provide a single definition of 'sporting merit' and its interaction with the pursuit of open competition, or should each sport be entitled to carry out its own balancing exercise?

Beyond these questions, any attempt to regulate the pursuit of 'sporting merit' would have to consider the effectiveness of doing so. Is the promotion of a competitive balance incompatible with the ESM's 'affective' dimension, or can it, in fact, contribute towards saving this affective dimension by safeguarding the competitiveness of European sport? Does this matter from the point of view of the Union's regulatory legitimacy? What can European sport law and policy learn from other areas of EU law, such as competition law or indeed technological regulation, which have faced questions about the balance between open markets, competition, and 'fairness'? How can it borrow the regulatory solutions embraced by the North American sport model in order to promote competitive competitions, rather than simply doing so selectively –

for example, by promoting a breakaway league that results in an even greater concentration of resources among a few elite clubs?

With the proliferation of alternative sport models and league structures within the European Union, as the intersection between EU law and sport governance becomes increasingly frequent, and as calls for a greater regulatory role from the European Union increase, the questions posed throughout this article are likely to become increasingly relevant, and to require a consistent approach from both regulators and policymakers. For this to be possible, the concept of 'sporting merit,' a central aspect of the Court's recent case law, requires careful consideration, both normatively and in practical terms. It is by shedding light on this notion, and by understanding the role that it plays – and should play – in EU law, that the present article hopes to contribute to the contemporary debate.

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